Supreme Court, U.S.
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NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HARVEY DURHAM,
Petitioner,

v.

DR. ALVIS L. CORUM,
Respondent.

Petition For Writ of Certiorari To
The Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE SUPREME COURT OF NORTH CAROLINA ACT CONTRARY TO THIS COURT'S HOLDINGS IN *HARLOW V. FITZGERALD* AND *ANDERSON V. CREIGHTON* WHEN, IN AN ACTION UNDER 42 U.S.C. § 1983 ALLEGING VIOLATIONS OF RESPONDENT'S FIRST AMENDMENT RIGHTS, IT AFFIRMED THE DECISION TO DENY THE PETITIONER QUALIFIED IMMUNITY SIMPLY BECAUSE THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO CREATE A GENUINE ISSUE OF FACT REGARDING THE PETITIONER'S SUBJECTIVE INTENT FOR DEMOTING THE RESPONDENT?

PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF NORTH CAROLINA

The parties to the proceeding in the Supreme Court of North Carolina were: Dr. Alvis L. Corum, plaintiff; and the University of North Carolina, through its Board of Governors; C.D. Spangler, President of the University of North Carolina, in his official capacity; Appalachian State University; and John Thomas, Chancellor of Appalachian State University, and Harvey Durham, defendants. As a result of the decision of the Supreme Court of North Carolina, the question presented affects only Harvey Durham in his individual capacity.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1992

HARVEY DURHAM,
Petitioner,

v.

DR. ALVIS L. CORUM,
Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of North Carolina

Petitioner, Harvey Durham, petitions for a writ of certiorari to review the opinion and judgment of the Supreme Court of North Carolina entered in ***Dr. Alvis L. Corum v. University of North Carolina***, 330 N.C. 761, 413 S.E.2d 276 (1992), on January 31, 1992.

OPINIONS DELIVERED IN THE CASE

The opinion of the Supreme Court of North Carolina in this case is reported as ***Corum v. University of North Carolina***, 330 N.C. 761, 413 S.E.2d 276 (1992) and is reprinted in the Appendix to this petition. (A1-A31). The decision of the North Carolina Court of Appeals is reported as ***Corum v. University of North Carolina***, 97 N.C. App. 527, 389 S.E.2d 596 (1990) and is reprinted at A32-A47. The decision of the Watauga County Superior Court, denying the defendants' motion for summary judgment, is not reported but is reprinted at A61-A62.

STATEMENT OF JURISDICTION

The Supreme Court of North Carolina rendered its decision on January 31, 1992. (A1). On June 26, 1992, the Supreme Court of North Carolina entered its order denying the petitioner's petition for rehearing. (A48). The petitioner believes that 28 U.S.C. § 1257(a) confers jurisdiction on the Court to review the January 31, 1992, judgment of the Supreme Court of North Carolina on grounds that both the petitioner and the respondent have claimed rights or immunities under the Constitution or statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

First Amendment to the Constitution
of the United States of America

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case involves a university official's right to qualified immunity from suit resulting from his disciplining a subordinate for statements made during closed university business meetings.

The Appalachian Collection is a collection of books, manuscripts, and artifacts pertaining to Appalachian culture housed on the campus of Appalachian State University (ASU). Beginning in September 1983, and continuing for several months, various ASU administrators discussed the possibility of moving the Appalachian Collection from Dougherty Library on the ASU campus to another suitable location. Dr. Alvis Corum, who was then Dean of Learning Resources, was responsible for the Appalachian Collection, and thus was included in much of the discussion and planning. In addition, Dr. Harvey Durham, the ASU Vice-Chancellor for Academic Affairs and Dr. Corum's immediate supervisor, and Dr. Clinton Parker, Associate Vice-Chancellor for Academic Affairs, were involved in the ongoing discussions.

The need to relocate the Appalachian Collection arose out of ASU's need to use the space the Collection occupied in Dougherty Library for other purposes. Several options were available, and during the 1983-84 academic year ASU administrators had many discussions concerning whether the Appalachian Collection should be moved to Belk Library or to University Hall and also whether the artifacts should be moved to a separate location from the written materials. Some persons, including Dr. Corum, felt strongly that the Appalachian Collection should not be split in two and that the written materials and the artifacts should continue to be housed together.

The discussions concerning the move of the Appalachian Collection continued during the early months of 1984. On 22 May 1984, Dr. Corum participated in a meeting with Dr. Durham in which Dr. Corum again expressed his views with respect to the the Appalachian Collection and in particular his belief that the

written materials in the Appalachian Collection should not be separated from the artifacts.

On 21 June 1984, after having carefully considered the options with respect to the Appalachian Collection, Dr. Durham reached his decision concerning the relocation of the Appalachian Collection. On that date, Dr. Durham informed Dr. Corum that the Appalachian Collection would be moved to University Hall and the move would need to be completed within, roughly, a two-week period. Everyone understood that time was of the essence because the space the Appalachian Collection occupied in Dougherty Hall needed to be renovated for its new use in time for the next semester. During the 21 June 1984 meeting, Dr. Durham also informed Dr. Corum that relocating the Appalachian Collection would include removing the personnel and budget which supported the Appalachian Collection from Dr. Corum's supervision in Learning Resources to the new administrative home for the Appalachian Collection. Although Dr. Corum expressed no opposition to the decision to move the Appalachian Collection per se, he did inform Dr. Durham that he opposed moving the organizational structure to another department, a move he had never contemplated would be a part of the physical move of the Appalachian Collection.

Despite his concerns, Dr. Corum initially proceeded, in accordance with Dr. Durham's instructions, to set up a meeting to work out the details of the move. In his deposition, Dr. Corum stated several times that he felt that a final decision regarding the Appalachian Collection had been made and it was time to move on it.

Pursuant to Dr. Durham's directives, a meeting of ASU administrators involved with the relocation was convened on 25 June 1984. Present at that meeting were Dr. Corum; Dr. Barker, the University Librarian; Ms. Judy Ball, the library staff member associated with the Appalachian Collection; and Dr. Clinton

Parker, Associate Vice-Chancellor of Academic Affairs. Dr. Durham was out of town at the time and , therefore, Dr. Parker attended the meeting as Dr. Durham's representative. Everyone present understood that Dr. Parker was there to represent Dr. Durham.

At the outset of the meeting, Dr. Parker announced that the written materials in the Appalachian Collection would be moved to University Hall and that the artifacts would be stored in Belk Library. During his deposition, Dr. Corum testified that at the time he believed that Dr. Parker's announcement regarding the storage of the artifacts in Belk Library differed from his understanding of Dr. Durham's decision regarding the relocation of the Appalachian Collection. Dr. Corum admitted in his deposition, however, that he did not question Dr. Parker about this perceived difference.

Following the 25 June 1984 meeting, Dr. Corum and Mr. Barker met to discuss their concerns about the move. Out of their conversations came the idea to submit an alternate proposal to the move as described by Dr. Parker.

A second meeting was held 26 June 1984. For this meeting, Dr. William Strickland, Dean of Arts and Sciences, joined the other participants in an effort to continue to work out the details of the move.

At the very beginning of the second meeting, Dr. Corum announced his desire to read an alternate proposal that he had developed for relocating the Appalachian Collection. Dr. Parker reluctantly agreed, stating, "The decision's already been made and it won't do any good, but go ahead." Dr. Corum then proceeded to read a memorandum which explained his alternate proposal for relocating the Appalachian Collection. In his memorandum, Dr. Corum claimed that Dr. Durham's decision to move the Appalachian Collection to University Hall presented many problems and

proposed instead to "[m]ove the Collection into Belk Library and intershelve the holdings with the regular University Library."

In his response to Dr. Corum's proposal, Dr. Parker stated that the "time for talking was over," that the decision had been made, and that he had no authority to entertain any new proposals. Dr. Parker further informed Dr. Corum that he did not have authority to consider the proposal and that Dr. Corum would have to take up any new proposals with Dr. Durham because only he could change the plans for the move.

According to Dr. Parker, Dr. Corum then announced that he was not going to go through with the move until he could talk to Dr. Durham. Dr. Parker ultimately agreed to call Dr. Durham and relay Dr. Corum's message to him. At that point the meeting was "deadlocked" and there was no reason to continue it.

Immediately after the meeting on June 26, Dr. Parker tried to reach Dr. Durham in Chapel Hill but was unsuccessful until about 6:30 P.M. Dr. Parker then briefly reported to Dr. Durham that Dr. Corum had presented an alternate proposal for moving the Appalachian Collection and had refused to go any further with plans to move the Appalachian Collection until he could discuss his alternate proposal with Dr. Durham. In response to this information, Dr. Durham said, "The time for talking is over. We've talked about this for months." Dr. Durham immediately left Chapel Hill to return to Boone.

The following morning, after meeting with the Chancellor, Dr. Durham called Dr. Corum into his office and relieved him of his duties as Dean of Learning Resources. Chancellor Thomas subsequently affirmed Dr. Durham's decision. Dr. Corum retained his position as a tenured faculty member.

On February 20, 1987, Dr. Corum filed the present action in which, among other claims, he alleged that Harvey Durham in

his individual capacity had violated his right to freedom of speech under the first amendment to the Constitution and, pursuant to 42 U.S.C. § 1983, demanded damages from Dr. Durham. (A50-A54). Dr. Durham, along with the other named defendants, filed an answer in which, among other defenses, they alleged that the named individual defendants were entitled to qualified immunity. (A58).

After discovery, the defendants moved for summary judgment on a variety of defenses including their claim for qualified immunity. (A60). The superior court denied their motion for summary judgment on grounds of qualified immunity. (A61-A62). The defendants then appealed that decision to the North Carolina Court of Appeals on grounds that it was contrary to this Court's decision in ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982), and that the individual defendants had a right to immediate appellate review of that issue pursuant to this Court's decision in ***Mitchell v. Forsyth,*** 472 U.S. 511 (1985). (A63). In the Record on Appeal, the defendants' first Assignment of Error was "[The defendants assign as error t]he trial court's denial of the Defendant's [sic] Motion for Summary Judgment on grounds that the Defendants are immune from suit and the trial court's ruling is contrary to law." (Record, p. 48).

On appeal, the North Carolina Court of Appeals reversed the superior court on that issue and held that the individual defendants were entitled to qualified immunity from suit for damages of the alleged violation of Dr. Corum's first amendment rights. (A40)

Dr. Corum then filed a timely appeal and petition for discretionary review in which he requested that the Supreme Court of North Carolina review the Court of Appeals decision which "denied plaintiff's claim for damages against the individual defendants John Thomas and Harvey Durham for violation of his First Amendment rights on the grounds that the individual defen-

dants had qualified immunity from suit." (Plaintiff's Notice of Appeal and Petition for Discretionary Review, p. 1). The Supreme Court of North Carolina granted Dr. Corum's request for review.

After appropriate briefing and argument, the Supreme Court of North Carolina reversed the Court of Appeals and held that Harvey Durham was not entitled to qualified immunity from Dr. Corum's claim for damages under 42 U.S.C. § 1983. (A20). The Supreme Court of North Carolina did, however, dismiss Dr. Corum's 42 U.S.C. §1983 claims against ASU, UNC, President Spangler and Chancellor John Thomas, in their official and individual capacities. (A20). Ultimately, the Supreme Court of North Carolina remanded the case for trial of Dr. Corum's 42 U.S.C. § 1983 claim against Dr. Durham and other state law claims. (A31).

The defendants thereafter petitioned the Supreme Court of North Carolina to rehear several issues including "whether Dr. Harvey Durham is entitled to summary judgment on his defense of qualified immunity from liability for money damages on the plaintiff's claim under 42 U.S.C. § 1983 that Dr. Durham violated his rights to freedom of speech as guaranteed under the first and fourteenth amendments?" (Defendant-Appellants' Petition for Rehearing, p. 1). The Supreme Court of North Carolina denied the petition for rehearing on June 26, 1992. (A48-A49).

REASONS WHY THE COURT SHOULD ALLOW THE WRIT

THE NORTH CAROLINA SUPREME COURT'S DECISION THAT HARVEY DURHAM WAS NOT ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY FOR DAMAGES ON DR. CORUM'S FIRST AMENDMENT CLAIMS BECAUSE THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO RAISE A GENUINE ISSUE AS TO DR. DURHAM'S SUBJECTIVE INTENT FOR DEMOTING DR. CORUM IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *HARLOW V. FITZGERALD* AND *ANDERSON V. CREIGHTON*.

The Supreme Court of North Carolina summarized its holding regarding Dr. Durham's claim to qualified immunity as follows:

> The evidence before the trial court on the motion for summary judgment was sufficient to raise a material question of fact as to the motive of Dr. Durham in demoting Dr. Corum. Dr. Durham's evidence indicates his motive was to promote discipline and efficient administration of ASU; Corum's evidence indicates that Dr. Durham's motive was to stifle debate over the issue, to carry out his decision to split the Appalachian Collection quickly, as well to improperly punish Dr. Corum. We hold that plaintiff has presented sufficient specific evidence of improper motive to defeat Durham's motion for summary judgment.

(A20).

This decision is in direct conflict with the decisions of this Court which hold that the subjective intents and motives of

defendants are irrelevant to the issue of whether they are entitled to qualified immunity from damages in actions brought pursuant to 42 U.S.C. § 1983. ***Harlow v. Fitzgerald***, 457 U.S. 800 (1983); ***Anderson v. Creighton***, 483 U.S. 635 (1987).

Since at least 1951 this Court has recognized that governmental officials are entitled to qualified immunity from liability for damages under 42 U.S.C. § 1983. ***Tenney v. Brandhove***, 341 U.S. 367 (1951). In discussing the public policies which support granting qualified immunity to school officials sued under 42 U.S.C. § 1983, the Court has said:

> We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.
>
> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity--absolute or qualified--for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and

> possible injury from such error than not to decide or act at all."
>
> ***Scheuer v. Rhodes***, 416 U.S. [232] at 241-242. (Footnote omitted.)

Wood v. Strickland, 420 U.S. 308, 321 (1975).

In ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982), the Court specifically noted that "the subjective element of the good-faith defense frequently has proven incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-816. Therefore, the Court held that, henceforth, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-881. Instead, the Court held that the qualified immunity available to government officials would depend on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.* at 818. The Court described the exact scope of government officials' qualified immunity as follows:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citations omitted.]
>
> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id.

In ***Anderson v. Creighton***, 483 U.S. 635, 641, the Court reiterated that the defendant's subjective beliefs about his conduct are irrelevant. In that case, the Court emphasized that, before a government official can be denied qualified immunity from damages for depriving a plaintiff of constitutional rights, the right at issue must be clearly established in the particular context of the facts of the case.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, *see* ***Mitchell [v. Forsyth***, 472 U.S. 511], at 535, n.12.; but it is to say that in light of preexisting law the unlawfulness must be apparent.

Id. at 640. Stated otherwise, if reasonable persons could disagree on the contours of the right allegedly violated, immunity should be granted. ***Malley v. Briggs***, 475 U.S. 335, 341 (1986).

The discrepancy between this Court's descriptions of the essential elements of a defense of qualified immunity and the Supreme Court of North Carolina's holding that evidence of Dr. Durham's improper motive deprived him of his right to qualified immunity could not be clearer. This Court has expressly rejected the argument that claims or evidence of a defendant's malicious intent are sufficient or, indeed, even relevant to the issue of qualified immunity. Nevertheless, the Supreme Court of North Carolina expressly rejected Dr. Durham's qualified immunity defense on grounds that Dr. Corum had presented sufficient evidence of Dr. Durham's "improper motive" to raise a genuine issue of fact. (A20).

In an attempt to justify its obvious departure from this Court's holdings that the availability of a qualified immunity defense is dependent on the "objective reasonableness of an official's conduct," not his subjective intents or motives, the Supreme Court of North Carolina stated that

> an inquiry into Dr. Durham's motive or intent in demoting Corum is an unavoidable part of the process of determining whether a *reasonable vice chancellor's actions* here can be said to have violated Dr. Corum's First Amendment rights. This is so because if the motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results.

(A15). (Emphasis added).

This statement of the issue is not substantially different from this Court's opinion in ***Anderson v. Creighton***, 483 U.S. 635 (1987). In ***Anderson***, the Court considered the defendants' claim to qualified immunity in the context of an alleged violation of the plaintiff's right to be free from unreasonable search under the fourth amendment. In reaching its decision, the Court first held that "the determination of whether it is objectively reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials." *Id.* at 641. The Court warned, however, that such an inquiry "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that ***Harlow*** sought to minimize." Instead, the Court emphasized that

> [t]he relevant question in this case, for example, is the objective (albeit fact-specific) question *whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the informa-*

> *tion the searching officers possessed.* Anderson's subjective beliefs about the search are irrelevant.

Id. at 641. (Emphasis added).

Contrary to the decision in ***Anderson***, the Supreme Court of North Carolina did not actually review the record to determine whether a reasonable vice-chancellor, in light of clearly established first amendment law and the information that Dr. Durham possessed, could have believed that the decision to demote Dr. Corum for his speech was lawful. Instead, the lower court simply determined that "[t]he evidence before the trial court on the motion for summary judgment was sufficient to raise a material question of fact as to *the motive of Dr. Durham* in demoting Dr. Corum." (A20). This is clearly not the relevant inquiry when determining Dr. Durham's claim to qualified immunity.

In rendering its decision in this case, the lower court erroneously equated the motive of a hypothetical reasonable vice-chancellor acting with the same knowledge as Dr. Durham and in light of clearly established first amendment law with Dr. Durham's actual motive for demoting Dr. Corum. The former is the proper issue when deciding a motion for summary judgment on grounds of qualified immunity, the latter is the proper inquiry when determining a motion for summary judgment on the merits of Dr. Corum's claim. If Dr. Corum were unable to produce any evidence that Dr. Durham demoted him because of the statements he made during the administrative meeting to implement the move of the Appalachian Collection, then Dr. Durham would be entitled to summary judgment on the merits and there would be no reason to address the issue of qualified immunity. In effect, the Supreme Court of North Carolina's decision to deny Dr. Durham's claim for qualified immunity compressed the issues of qualified immunity and summary judgment on the merits into one defense.

When analyzed in light of the clearly established first amendment precedents, the evidence in the record unequivocally

supports Dr. Durham's claim to qualified immunity. In ***Connick v. Myers***, 461 U.S. 138 (1983), this Court thoroughly explained the law governing a public employer's rights to discipline his employees for their expressive activities. The Court first described the difference between speech protected under the first amendment, i.e., comments on matters of "public concern," and employee speech which is not entitled to first amendment protection, i.e., complaints over internal office affairs.[1]

The Court then went on to discuss the circumstances under which a public employer would be justified in discharging an employee even when the speech in question touched on a matter of public concern. *Id.* at 149-155. In this portion of the opinion, the Court emphasized that its decision in ***Pickering v. Board of Education***, 391 U.S. 563 (1968) required courts to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through it employees." ***Connick v. Myers***,

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1 In ruling that Dr. Durham was not entitled to qualified immunity in this case, the lower court erroneously stated that the defendants had not raised the issue of whether Dr. Corum's speech was on a matter of public concern in their brief. (A13). In fact, in the Defendant-Appellees' New Brief, which was the only brief the petitioners submitted on this issue, Dr. Durham had contended that

> In light of the fact that Dr. Corum's proposal was made in the context of an administrative meeting rather than a public gathering and involved matters of internal University administration, it cannot be said that Dr. Corum's statement lies close to the heart of those freedoms protected by the First Amendment.

Defendant-Appellees' New Brief, p. 9.

461 U.S. at 142, (*quoting* ***Pickering v. Board of Education***, 391 U.S. at 568).

In striking that balance, the ***Connick*** Court emphasized that

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that disruption of the office and the destruction of working relationships is manifest before taking action.

Id. at 151-152.

In the context of the case before it, the Court specifically noted that there was no demonstration that Myers' speech actually impeded her ability to perform her responsibilities. *Id.* at 151. The Court emphasized that Myers' speech contained statements which carried the "clear potential for undermining office relationships." *Id.* at 152. The Court also noted that the fact that Myers "exercised her rights to speech at the office supported Connick's fears that the functioning of his office was endangered." *Id.* at 153. Finally, the Court stated that the fact that Myers' questionnaire arose out of a dispute regarding her transfer also supported Connick's decision to discharge her:

> When employee speech concerning office policy arises from an employment dispute concerning the very application of the policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.

Id.

All the facts which lead this Court to hold that Connick did not violate Myers' first amendment rights are also present in this case. Like Myers' questionnaire, Dr. Corum's speech was made in the office and was directed only to other University personnel who worked under Dr. Durham. Like Myers, Dr. Corum made his speech in the absence of his supervisor. Like Myers' speech, Dr. Corum's statements could reasonably have been interpreted, and were interpreted by Dr. Durham's assistant, Dr. Parker, as a refusal to proceed to implement Dr. Durham's decision until after he had had an opportunity to speak to Dr. Durham. (A18-19). Finally, like Myers' questionnaire, Dr. Corum's speech arose out of a dispute between him and his supervisor on how best to handle the Appalachian Collection, a dispute in which Dr. Corum, as Dean of Learning Resources, had a vested, professional interest.

Rather than consider all this evidence of *potential disruption*, the Supreme Court of North Carolina simply observed that Dr. Corum's speech did not impede his duties or interfere with the regular operation of the University. (A14). Ironically, the lower court considered that the fact that Dr. Durham had demoted Dr. Corum precluded Dr. Corum from interfering with ongoing library functions and, thereby, rendered Dr. Corum's danger to the organization de minimus. (A14). Thus, in the opinion of the Supreme Court of North Carolina, Dr. Durham's effective intervention to prevent Dr. Corum from undermining his authority and interfering with the efficient operation of the University deprived him of the very evidence he would need to prevail on his qualified immunity defense.

CONCLUSION

This Court has held that effective government depends upon balancing a citizen's right to damages to remedy personal injuries against the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." ***Harlow v.***

Fitzgerald, 457 U.S. at 807, *quoting* ***Butz v. Economou***, 438 U.S. 478 at 506 (1978). The Court's decisions in ***Harlow***, ***Anderson*** and ***Connick*** all reflect its extraordinary efforts to strike the proper balance between those competing interests.

In this case, Dr. Durham could reasonably have believed that Dr. Corum's speech would disrupt his office, undermine his authority and destroy close working relationships. Therefore, he was entitled to qualified immunity on grounds that, in light of existing precedents and the information he possessed, his decision to demote Dr. Corum did not violate the clearly established law. ***Harlow v. Fitzgerald***, 457 U.S. at 818; ***Anderson v. Creighton***, 483 U.S. at 641.

Contrary to these facts and precedents, the Supreme Court of North Carolina denied Dr. Durham's claim to qualified immunity simply because there was sufficient evidence to raise a genuine issue of fact regarding Dr. Durham's actual, subjective intent for demoting Dr. Corum. This is the very element which this Court has held incompatible with the purpose of the qualified immunity defense, *i.e.*, protecting government officials' authority to exercise discretionary functions by preventing insubstantial claims from going to trial. ***Harlow v. Fitzgerald***, 457 U.S. at 815-817. (A20). If this Court declines to review this decision, the North Carolina courts will undoubtably stray further and further from the correct rule of law. Therefore, the Court should grant this petition to review the decision of the Supreme Court of North Carolina which is in direct conflict with the holdings in ***Harlow*** and ***Anderson***.

Respectfully submitted, this the 23rd day of September 1992.

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APPENDIX

APPENDIX

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IN THE SUPREME COURT OF NORTH CAROLINA

DR. ALVIS L. CORUM	)	
	)	
v.	)	No. 163PA90 - Watauga
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UNIVERSITY OF NORTH CAROLINA through its Board of Governors; C. D. SPANGLER, President of the UNIVERSITY OF NORTH CAROLINA in his official capacity; APPALACHIAN STATE UNIVERSITY; and JOHN THOMAS, CHANCELLOR OF APPALACHIAN STATE UNIVERSITY, and HARVEY DURHAM	)	FILED Jan 31 1992

On appeal and discretionary review of an opinion by the Court of Appeals, 97 N.C. App. 527, 389 S.E. 2d 596 (1990), reversing an order entered 21 October 1988 by Gray, J., which denied defendants' motion for summary judgment. Heard in the Supreme Court 11 February 1991.

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WILLIAM G. SIMPSON, JR., JOHN VAIL, TRAVIS PAYNE, J. MICHAEL MCGUINNESS, for amicus curiae North Carolina Civil Liberties Union Legal Foundation; and M. JACKSON NICHOLS, for amicus curiae North Carolina Association of Educators.

MARTIN, Justice.

For the reasons stated below, we reverse in part and affirm in part the decision of the Court of Appeals. Plaintiff filed this action on 20 February 1987 seeking injunctive relief and damages for the defendants' alleged retaliation against plaintiff for his exercise of certain free speech rights. Plaintiff's claims were brought under the North Carolina Constitution Article I, Sections 14, 19, and 35 and 42 U.S.C. § 1983. After filing an answer containing defenses, which included sovereign immunity and qualified immunity, defendants moved for summary judgment. Defendants' motion for summary judgment was denied on 21 October 1988.

Defendants appealed the denial of their motion for summary judgment to the Court of Appeals. The Court of Appeals properly reasoned that a denial of a summary judgment motion is normally not immediately appealable; however, under the case of ***Mitchell v. Forsyth***, 472 U.S. 511, 86 L. Ed. 2d 411 (1985), when a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment. The Court of Appeals went on to hold that the trial court erred in denying defendants' summary judgment motion with respect to plaintiff's 42 U.S.C. § 1983 claims, except for the motion pertaining to plaintiff's claims against individual defendants Spangler, Thomas, and Durham in their official capacities only for prospective injunctive relief. The Court of Appeals further held that the trial court erred in failing to grant defendants' motion for summary judgment with respect to plaintiff's claims brought under the State Constitution regarding the University of North Carolina, Appalachian State University, and the three individual defendants in their official capacities. The Court of Appeals also held that the defendants' motion was properly denied insofar as it concerned plaintiff's claims for monetary damages against the two

individually named defendants for violation of plaintiff's state constitutional rights.

Viewing the record in the light most favorable to plaintiff, as we must when evaluating a summary judgment motion, the following facts arise upon the record. In early summer 1984, the plaintiff, a tenured faculty member at Appalachian State University, was the Dean of Learning Resources, a position he had held for approximately fourteen years. As dean, Dr. Corum's responsibilities included supervising Appalachian State University's academic support units, including the library, the audiovisual services, and the Appalachian Collection. The Appalachian Collection, a diversified collection of books, research reports, music, and artifacts, represents the mountain culture of the Southern Appalachian Region. Until mid-summer 1984 the Appalachian Collection was housed in the Daughtery Library.

Beginning in September 1983 and continuing for several months, various administrators at Appalachian State University ("ASU") discussed the possibility of moving the Appalachian Collection out of the Daughtery Library into different facilities. The plaintiff's chief concern regarding this move was that the Appalachian Collection remain intact so that the artifacts would not be split off from the books, manuscripts, and other materials. In the administrative chain of command at ASU the person responsible for deciding where the Appalachian Collection would be moved and whether it would be broken up was defendant, Dr. Harvey Durham. Dr. Durham was the Vice Chancellor for Academic Affairs and Dr. Corum's immediate supervisor.

In December 1983 Dr. Durham decided to split up the Collection and move the artifacts to University Hall, a building on the campus where the artifacts would form the basis of a new museum. The decision to split the artifacts off from the rest of the Collection was not communicated to Dr. Corum at this time;

however, the decision was documented by a memorandum written at or near the time of the decision.

On 21 June 1984 Dr. Durham informed Dr. Corum that the Appalachian Collection would be moved to University Hall and that the move would need to be completed within a two-week period. On that same day, Dr. Durham informed Dr. Corum that the relocation of the Collection also entailed removing the personnel and budget supporting the Collection from Dr. Corum's purview to a new administrative home. While Dr. Corum expressed concern over this transfer, he accepted the decision as one which was workable because, in his understanding, it would at least maintain the physical integrity of the Collection. Dr. Durham did not inform Dr. Corum at this time that the artifacts would be separate from the rest of the Collection. Dr. Corum proceeded to set up a subsequent meeting with the relevant administrators in order to work out the details of the moving of the Collection; the next meeting was scheduled for 25 June 1984.

At the 25 June meeting, Dr. Corum met with Dr. Baker, ASU's Librarian; Ms. Ball, the library staff member associated with the Appalachian Collection; and Dr. Clinton Parker, an Associate Vice Chancellor of Academic Affairs. Dr. Parker attended the meeting as Dr. Durham's representative because Dr. Durham had gone out of town. At the outset of the meeting on 25 June, Dr. Parker announced to those assembled that the written material in the Appalachian Collection would be moved to University Hall, while the artifacts would be stored in Belk Library. Dr. Corum later testified that he saw this announcement as a dramatic shift from the directions previously given to him by defendant Durham.

The day after this meeting, plaintiff sought to present an alternative plan for the relocation of the Appalachian Collection, a plan that would keep the Collection secure and physically intact. Dr. Corum read aloud his proposal for an alternate location during

a meeting held 26 June 1984 that was attended by Dr. Parker and Dr. William Strickland, Dean of Arts and Sciences at ASU. In the memorandum that he read to those assembled, Dr. Corum claimed that Dr. Durham's decision to move the Collection to University Hall presented many problems. Dr. Corum proposed instead to move the Collection into Belk Library and intershelve the holdings with the regular university library. To this proposal Dr. Parker responded that he had no authority to change Dr. Durham's decision. However, Dr. Parker volunteered to try to contact Dr. Durham to let him know of Dr. Corum's concerns. Dr. Parker did contact Dr. Durham later in the evening regarding Dr. Corum's concerns.

There is a material issue of fact in dispute as to whether at the 26 June meeting Dr. Corum refused to implement the move as per Dr. Durham's 21 June directive or whether he encouraged his staff to go ahead with the move. The defendants' position is that Dr. Corum announced at the meeting that he would not go through with the move until he could talk to Dr. Durham. Dr. Corum's account is that he did not resist the move and cooperated fully despite his misgivings about the decision. Dr. Corum actually physically helped in the packing and moving.

When Dr. Parker called Dr. Durham after the 26 June meeting, Dr. Durham responded by immediately returning to ASU. Dr. Durham met at 6:30 a.m. on 27 June with defendant Dr. Thomas, the Chancellor of ASU. At 8:30 a.m. Dr. Durham met with Dr. Corum and informed him that he was being removed from his deanship. There is no evidence that Dr. Durham gave Dr. Corum an opportunity to explain his proposal or to comment on the events of the previous day. Chancellor Thomas subsequently affirmed Dr. Durham's decision to remove Dr. Corum from his duties as Dean of Learning Resources. Dr. Corum has, however, retained his position as a tenured faculty member.

Plaintiff contends that defendants discharged him from his deanship in retaliation for his speaking freely about the moving of the Appalachian Collection. Plaintiff contends that Dr. Durham's concealment of the fact that the Collection was to be split was intended to make the move administratively easier by preventing vocal opposition to the decision. When this "ruse" was discovered and exposed by Dr. Corum in his speaking out, defendants improperly removed him in retaliation for his speech. Plaintiff seeks damages and, among other things, reinstatement as Dean of Learning Resources as a result of this impermissible retaliatory removal.

It is defendants' position that the sole reason Dr. Corum was removed from his deanship was because he refused to carry out the move, and this insubordination justified his demotion.

Plaintiff filed a grievance proceeding with the University of North Carolina ("UNC") which resulted in a decision that Dr. Corum had failed to prove that his removal from the deanship was impermissibly based on his exercise of his right to freedom of speech. After this proceeding was completed Dr. Corum filed the instant case on 20 February 1987.

I. 42 U.S.C. § 1983 CLAIMS

Plaintiff's complaint alleges:

> 24. In relieving plaintiff of his duties as Dean and in denying plaintiff salary increases in retaliation for plaintiff having exercised his First Amendment rights, defendants violated plaintiff's rights protected by the First and Fourteenth Amendments of the Constitution of the United States. Such acts are in violation of 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, plaintiff sought a preliminary and permanent injunction, additional equitable relief including reinstatement, promotion, and compensatory seniority, as well as monetary damages. Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress.

42 U.S.C. § 1983 (1979). The law regarding the interpretation of section 1983 is labyrinthine; for purposes of clarity we discuss the law in terms of several subcategories.

A. ASU, UNC, and State Officials - Official Capacities

The text of section 1983 permits actions only against a "person." In ***Will v. Michigan Dept. of State Police***, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), the Supreme Court held that when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are "persons" under section 1983 when the remedy sought is monetary damages.[1] *Accord* ***Quern v. Jordan***, 440 U.S. 332, 59 L. Ed. 2d 358 (1979). Thus, under section 1983 plaintiff in the instant case is barred from seeking damages from UNC,

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1 ***Kentucky v. Graham***, 473 U.S. 159, 165-67, 87 L. Ed 2d 114, 121-22 (1985) (explaining official versus individual capacities).

ASU, Harvey Durham in his official capacity, Dr. Thomas in his official capacity, or C.D. Spangler in his official capacity.[2]

Notably however, when injunctive relief is being sought under section 1983 from State institutions or employees acting in their official capacities, such equitable actions are not barred. The *Will* court explained:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." ***Kentucky v. Graham***, 473 US at 167, n 14, 87 L Ed 2d 114, 105 S Ct 3099; ***Ex Parte Young***, 209 US 123, 159-160, 52 L Ed 714, 28 S Ct 441 (1908).

Will, 491 U.S. at 71 n.10, 105 L. Ed. 2d at 58 n.10. Therefore, plaintiff's action against UNC, ASU, and the individual defendants sued in their official capacities for prospective equitable relief is not barred because in this context these defendants are "persons" reachable under section 1983.

In addition, under the federal cases interpreting section 1983, sovereign immunity alleged under state law is not a permissible defense to section 1983 actions. **Martinez v. California**, 444 U.S. 277, 283, 62 L.Ed. 2d 481, 488 (1980) (sovereign immunity cannot bar liability in section 1983 actions filed in state

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2 While the Court of Appeals reaches this result it does so under the case of Truesdale v. University of North Carolina, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied*, 323 N.C. 323 N.C. 706, 377 S.E.2d 229 (1989), *cert. denied*, 493 U.S. 808, 107 L. Ed. 2d 19 (1989). Insofar as ***Truesdale*** states that section 1983 actions against state institutions are barred by the doctrine of sovereign immunity, it is overruled. ***Martinez v. California***, 444 U.S. 277, 283, 62 L. Ed. 2d 481, 488 (1980) (sovereign immunity cannot bar liability in section 1983 actions filed in state courts); *accord* ***Howlett v. Rose***, 496 U.S._____, 110 L. Ed. 2d 332 (1990).

courts). The defense of qualified immunity is not available under section 1983 to one sued in his official capacity. ***Brandon v. Holt***, 469 U.S. 464, 83 L. Ed, 2d 878 (1985).

Having determined that the equitable relief sought against the defendants in their official capacities is not barred under section 1983 and that the defenses of sovereign and qualified immunity are not available to defendants, the question then becomes whether plaintiff has made a sufficient forecast of evidence to repel defendant's motion for summary judgment. Before examining the factual basis set forth by plaintiff in this regard, we continue analysis of section 1983 and will treat the factual aspect below in toto.

B. Durham and Thomas - Individual Capacities

Under ***Kentucky v. Graham***, 473 U.S. 159, 87 L. Ed. 2d 114 (1985), state governmental officials can be sued in their individual capacities for damages under section 1983. This holding was affirmed and applied in ***Hafer v. Melo***, --- U.S. ---, --- L. Ed. 2d --- (Nov. 1991). This is because unlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Such individuals are sued as individuals, not as governmental employees. Presumably, they are personally liable for payment of any damages awarded. Under United States Supreme Court precedent, however, such officials sued as individuals may raise a defense of qualified immunity. ***Harlow v. Fitzgerald***, 457 U.S. 800, 73 L. Ed. 2d. 396 (1982). The defendants in the instant case have raised this defense.

Harlow sets forth an objective standard for determining whether qualified immunity will act as a bar to further litigation in a suit by providing that "government officials performing discretionary functions generally are shielded from liability for

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818, 73 L. Ed. 2d at 410.[3] This standard was set forth to allow determination of whether a qualified immunity defense bars further proceedings by means of a process of examining the law in existence at the time of the offense to determine whether it contained "clearly established...rights of which a reasonable person would have known." *Id.* By using the "reasonable person standard," "the Supreme Court intended to avoid the necessity of an evidentiary consideration of whether a defendant raising the immunity defense, in fact, subjectively knew that his conduct toward plaintiff would violate plaintiff's constitutional rights. ***Harlow***, 457 U.S. 800, 73 L. Ed. 2d 396 (citing ***Wood v. Strickland***, 420 U.S. 308, 322, 43 L. Ed. 2d 214, 225 (1975)). *Cf.* ***Mitchell***, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 425 (Qualified immunity, if available, provides "***an immunity from suit*** rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

As a number of federal courts of appeal have observed, however, ***Harlow's*** "purely 'objective' test cannot in the end avoid the necessity to inquire into official motive of intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated." ***Collinson v. Gott***, 895 F.2d 994, 1001-02 (4th Cir. 1990) (Phillips, J., concurring) (citations omitted). *Accord, e.g.*, ***Stewart v. Baldwin County Bd. of Election***, 908 F.2d 1499 (11th Cir. 1990); ***Morris v. Clifford***, 903 F.2d 574 (8th Cir. 1990); ***Pueblo Neighborhood Health Ctrs., Inc. v. Lasavio***, 847 F.2d 642 (10th Cir. 1988). In other words, whether a qualified immunity defense is appropriate requires proof of an

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3 Although ***Harlow*** did not concern the elements of qualified immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983, see 457 U.S. at 410 n. 30, 73 L. Ed. 2d at 410 n. 30, later cases apply the ***Harlow*** standard to state officials in this context.

official's intent where the existence of a constitutional violation depends on proof of motivation. For example, as the Sixth Circuit Court of Appeals has written:

> [I]f a public employer terminates a black employee because he is black, that act clearly violates federal constitutional and statutory law. If, however, the employer terminates the black employee because of incompetence, then the discharge obviously does not violate the law at all. The act itself--the act of discharge--is neutral; it is the motive of intent that makes the act both actionable and violative of clearly established law.

Poe v. Haydon, 853 F. 2d 418, 431 (6th Cir. 1988), cert. denied, --- U.S. ---, 102 L. Ed. 2d 780 (1989).

Similarly, in the instant case, if the defendants demoted Corum *because* of his exercise of free speech rights, such demotion clearly would violate federal law. If, however, he was demoted because of insubordination, the discharge may not violate the law at all. The act itself--the act of demotion--is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. *Id.* Thus, in addition to ***Harlow's*** objective step--that is, a determination of whether at the time of the alleged act the law concerning the right was clearly established--we must also concern ourselves with the material issue of fact surrounding Dr. Durham's motive in demoting Corum. As explained below, we adopt the reasoning applied in the majority of federal circuit courts of appeal which have had to reconcile this issue with the objective test enunciated in ***Harlow***. In brief, this approach holds that

> where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by

> pointing *to specific evidence* that the officials' actions were improperly motivated.

Pueblo Neighborhood Health Ctrs., Inc. v. Lasavio, 847 F.2d 642, 649 (10th Cir. 1988) (emphasis supplied).

Under ***Harlow***, the first question arising upon the defendants' motion for summary judgment is whether a reasonable official in each defendant's position could have believed that his actions were lawful in light of clearly established law at the time and in light of the information possessed by the official at the time the conduct occurred. ***Harlow***, 457 U.S. 800, 73 L. Ed. 2d 396; ***Anderson v. Creighton***, 483 U.S. 635, 642, 97 L. Ed. 2d 523, 532 (1987). The right that the officials allegedly violated must have been clearly established in a particularized sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Anderson,*** 483 U.S. at 640, 97 L. Ed. 2d at 531. This is because "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." ***Harlow***, 457 U.S. at 818-19, 73 L. Ed. 2d at 411. *Accord* ***Anderson***, 483 U.S. 635, 640 n.2, 97 L. Ed 2d 523, 530 n.2. Therefore, our focus is not upon the broad First Amendment right to speak freely in its most general or abstract sense, but upon its application to the particular conduct being challenged in the instant case. ***Anderson***, 483 U.S. at 638-39, 97 L. Ed. 2d at 530; ***Collinson,*** 895 F. 2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring).

In the present case, this inquiry requires us to begin by examining the contours of a public employee's rights in June 1984 to speak without retaliation in his place of work. After this, we must ask (a) whether a reasonable vice chancellor (in the instant case, Dr. Durham) could have believed his actions were lawful in light of the information possessed by him at the time he demoted Dr. Corum, and (b) whether a reasonable chancellor (in the instant case, Dr. Thomas) could have believed that his or her actions in

officially approving the demotion were lawful in light of clearly established law at the time and in light of the information possessed by him at the time he approved the demotion of Dr. Corum.

As the United States Supreme Court explained in ***Connick v. Meyers***, "[f]or at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." ***Connick***, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 716-17 (1983). However, in 1984 public employee's right to speak was not absolute, nor is it today. Under ***Pickering v. Board of Educ.***, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 817 (1968), a public employee's right to free speech is limited by the government's need to preserve efficient governmental functions. As a recent case explained, "This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." ***Rankin v. McPherson***, 483 U.S. 378, 384, 97 L. Ed. 2d 315, 324 (1987).

A further limitation under ***Pickering*** is that only speech on a matter "of public concern" is constitutionally protected. ***Pickering***, 391 U.S. at 568, 20 L. Ed. 2d at 817. To determine whether speech fits in this category, the Court examines the content, form, and context of the public employee's speech. Only if the speech was on a matter of public concern is the balancing test reached.

In the oral argument before this Court, although not in the briefs, counsel for defendants[4] contended that Dr. Corum's speech was not on a matter of public concern. Even though not at issue on this appeal, the record discloses that the question of what to do

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4 The Attorney General represented all defendants by virtue of N.C.G.S. § 143-300.2.

with the Appalachian Collection had been publicly debated on the campus and was a matter of public concern. Given that the speech at issue addressed a matter of public concern we return to the ***Pickering*** balancing test to determine whether in 1984 the free speech rights allegedly violated by defendants were clearly established when defendants acted.

In the ***Pickering*** analysis the manner, time, and place of the employee's expression are relevant, as is the context in which the speech occurred. *See* ***Connick***, 461 U.S. 138, 75 L. Ed. 2d 708. *Accord, e.g.*, ***Rankin***, 483 U.S. at 388, 97 L. Ed. 2d. at 327. Specifically, considerations such as whether the speech impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise are relevant in balancing the two competing interests. ***Pickering***, 391 U.S. at 570-73, 20 L. Ed. 2d at 817-20.

In the instant case, we conclude that Dr. Corum had a constitutionally protected right to speak out in 1984 in the manner alleged. While the speech may have affronted Dr. Durham, it cannot be said that the speech impeded Corum's duties or interfered with the regular operation of the University, particularly during the approximately eighteen-hour period between the time he spoke out and the time he was demoted, nor was the likelihood of such interference over a longer interval great given that Corum did not, as we must presume on a review of a denial of summary judgment, refuse to carry out Durham's instructions. Later, in fact, Dr. Corum participated in carrying out Dr. Durham's directive. Durham's action in effect preempted the possibility of interference with ongoing library functions since it removed Corum from the chain of command. Since Corum's speech clearly could not have affected and did not affect Durham's decision to move the Appalachian Collection, its danger to the organization was *de*

minimis. This, we conclude, after having balanced competing interests, that Corum's interest in speaking out on this public issue outweighed any negative effect it might have had on the efficient functioning of ASU. The law was clearly established in 1984 that Corum had a right to speak out in the way alleged. *See* ***Pickering***, 391 U.S. 563, 20 L. Ed. 2d 811. Whether a material question of fact exists as to whether Corum's demotion was constitutionally justified is discussed hereinafter.

The next question then becomes whether a reasonable vice chancellor could have believed that demoting Dr. Corum was lawful in light of clearly established law and the information which he possessed at the time. ***Anderson***, 483 U.S. at 643, 97 L. Ed. 2d at 532-33. For purposes of this analysis, Dr. Durham's subjective beliefs about the legality of the demotion are irrelevant. *Id.*

Where the "clearly established law" contains a subjective element, as in this case, of motive or intent, it is a part of the summary judgment analysis. While his subjective beliefs in this narrow respect are not relevant, an inquiry into Dr. Durham's motive or intent in demoting Corum is an unavoidable part of the process of determining whether a reasonable vice chancellor's actions here can be said to have violated Dr. Corum's First Amendment rights. This is so because if the motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results. One problem this subjective analysis creates is difficulty in deciding at summary judgment whether a qualified immunity defense is justified for the official whose conduct and motive are challenged. As one judge has explained:

> Vindication of immunity policies depends heavily upon the ability to dispose of insubstantial claims by resolving immunity questions at the earliest possible stages of a litigation, preferably on pleading or summary judgment motions. *See* ***Mitchell***,

472 U.S. at 526, 105 S. Ct. at 2815. Questions of subjective states of mind are of course notoriously ill-adapted to summary resolution because of the ease with which they can be held at issue by conclusory allegations and conjectures in pleadings and discovery materials. ***Harlow's*** wholly "objective" test was adopted in large part to avoid this impediment to early resolution, by making irrelevant to the immunity inquiry any question of an official's "bad faith" or his purely subjective perceptions about a plaintiff's rights. *See* ***Harlow,*** 457 U.S. at 815-19, 102 S. Ct. at 2736-39. As several courts of appeals have since recognized, however, the resulting purely "objective" test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated. *See, e.g.,* ***Pueblo Neighborhood Health Centers, Inc. v. Losavio,*** 847 F.2d 642, 647-48 (10th Cir. 1988); ***Musso v. Hourigan,*** 836 F.2d at 743; ***Gutierrez v. Municipal Court,*** 838 F.2d 1031, 1050 n. 25 (9th Cir. 1988); ***Martin v. D.C. Metropolitan Police Dept.,*** 812 F.2d 1425, 1432 (D.C. Cir.) holding vacated, 817 F.2d 144 (D.C. Cir.), holding reinstated sub nom. ***Bartlett ex rel. Neuman v. Bowen,*** 824 F.2d 1240 (D.C. Cir. 1987).

As a result, as several of these courts also have recognized, there is a risk that in such cases the impediment to summary resolution that ***Harlow*** deliberately sought to remove could be reimposed. *See* ***Pueblo,*** 847 F.2d at 648; ***Martin,*** 812 F.2d at 1433. To minimize that risk, these courts have adopted a procedural approach designed to insure that meritorious immunity defenses can yet be established by summary judgment in such cases. Building on the Supreme Court's recent encouragement to proper usages of summary judgment in ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 106 S.

> Ct. 2548, 91 L. Ed. 2d 265 (1986), a*nd **Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d. 202 (1986), the Tenth Circuit, for example, has held that
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> > [w]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated.
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> ***Pueblo***, 847 F.2d at 649; *see also **Martin***, 812 F.2d at 1434.

Collinson, 895 at 1001-02 (4th Cir.) (Phillips, J. concurring). *Accord, e.g.*, ***Stewart***, 908 F.2d 1499 (11th Cir.).

This approach appropriately retains the ***Harlow*** "objective look" test with respect to the law applicable at the time of the alleged violation, but it also permits a plaintiff who has some proof of the alleged violation to attempt to convince the finder of fact that his allegations are correct. To foreclose this opportunity would effectively prevent every plaintiff from recovering on a claim which has an element requiring a determination of subjective intent.

In the present case then, the immediate question becomes whether there was sufficient evidence before the trial judge that Dr. Durham's demotion of Dr. Corum was improperly motivated, justifying the denial of summary judgment.

In this regard, Dr. Durham testified that he had gone to Chapel Hill prior to 25 June and that Dr. Parker, who had been at the meeting when Dr. Corum made his remarks, telephoned him to report on that meeting. Dr. Parker told him that Dr. Corum had

decided not to carry out the decision that had been made, and that Dr. Corum wanted to talk with him (Dr. Durham). Dr. Durham replied that the time for talking was over. He returned to Boone that night, contacted Chancellor Thomas, and met with Chancellor Thomas at 6:30 the next morning. All Dr. Durham had to rely upon in regard to Dr. Corum's position concerning the moving of the Collection was the short telephone conversation that he had the previous evening with Dr. Parker. At the 6:30 a.m. meeting with Chancellor Thomas, Dr. Durham made his recommendation to the Chancellor, and they agreed that Dr. Corum would be relieved of his responsibilities or given the opportunity to resign. Dr. Corum was relieved of his responsibilities as Dean of Learning Resources.

However, Dr. Parker's testimony as to the telephone communication with Dr. Durham was to the contrary. He testified:

> I told Harvey [Durham] that Bill Strickland and I had met with Al Corum, Judy Ball and Richard Barker, and that Al presented an alternative proposal and that he wanted to talk to Harvey about that before he would take any action regarding the Collection.
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> Q What was Dr. Durham's response?
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> A Well, I believe I asked him, "Do you want to talk to Dr. Corum?" And as well as I remember, his response was emphatic. He said, "Hell, no. The time for talking is over. I made my decision."
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> . . . .
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> Q And then, I believe, referring to the chronology there, you did have a meeting at 7:00 the next morning?
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> A Yes.

Q At that meeting at 7:00 did Dr. Durham inform you that he had just finished meeting with Chancellor Thomas, and he had decided to ask Dr. Corum to resign, and if Dr. Corum did not he was going to relieve him of his duties as Dean?

A Yes.

As to the 26 June meeting between Dr. Corum, Dr. Parker, and others, Parker testified:

Q Did you ever tell Dr. Durham in that meeting on June 26 that his desire to discuss the issue of how the move of-- tell Dr. Corum that his desire to discuss the hows and whys of the move of the Appalachian Collection further with Dr. Durham or to discuss it at some point with Dr. Thomas would be insubordination?

A I certainly did not.

Q You just answer the question, Dr. Parker. Now, what do you recall him actually saying?

A That he would not continue with it [dealing with the Appalachian Collection] until he had a chance to talk to Dr. Durham.

The effect of the proposed move on the Collection had been the subject of public debate on the campus. It was Dr. Corum's chief interest to keep the entire Collection intact when it was moved. However, the evidence also showed that Dr. Durham did not advise Dr. Corum that the Collection would be split up when he told Corum that it would be moved. The 21 June 1984 memorandum from Durham to Corum stated: "Further, the Appalachian Collection will be physically housed in University Hall," leading Corum to believe that the entire Collection would

be together. In fact, Durham had already decided to split the Collection, the artifacts to be stored in the basement of another building. Thus, the 21 June memo becomes the "smoking gun," revealing the effort to deceive Dr. Corum until it was too late for public protests. Dr. Alvis L. Corum's deposition, exhibit 2.

The evidence before the trial court on the motion for summary judgment was sufficient to raise a material question of fact as to the motive of Dr. Durham in demoting Dr. Corum. Dr. Durham's evidence indicates his motive was to promote discipline and efficient administration of ASU; Corum's evidence indicates that Dr. Durham's motive was to stifle debate over the issue, to carry out his decision to split the Collection quickly, as well as to improperly punish Dr. Corum. We hold that plaintiff has presented sufficient evidence of improper motive to defeat defendant Durham's motion for summary judgment. *See* ***Collinson***, 895 F.2d 994 (4th Cir.) (Phillips, J. concurring).

Upon the foregoing findings and conclusions, we hold that defendant Durham's motion for summary judgment based upon the defense of qualified immunity to plaintiff's 42 U.S.C. § 1983 claims was properly denied by the trial judge. The Court of Appeals erred in reversing the trial court's order denying defendant Durham's motion for summary judgment.

Plaintiff has failed to present a forecast of evidence as to any improper action or motive by ASU, UNC, President Spangler or Chancellor Thomas; therefore, the motion for summary judgment should have been allowed as to these defendants on all of plaintiff's 42 U.S.C. § 1983 claims.

II. STATE CONSTITUTIONAL CLAIMS

The Court of Appeals properly reversed the trial court's denial of summary judgment regarding plaintiff's state constitutional claims against defendants ASU, UNC, and President Spangler and Chancellor Thomas acting in their official capaci-

ties. However, as later discussed, the Court of Appeals erred in relying upon the doctrine of sovereign immunity in so deciding. The Court of Appeals erred in reversing the trial court on this issue as to defendant Durham.

This issue brings forward the question of whether a plaintiff has a direct cause of action under the State Constitution against governmental defendants for alleged violations of the plaintiff's free speech rights.

Our Constitution states: "Freedom of speech and Press. Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. The words "shall never be restrained" are a direct personal guarantee of each citizen's right of freedom of speech.

In ***Midgett v. Highway Commission***, this Court held:

> Our Constitution, Article I, section 17, guarantees payment of compensation for property taken by sovereign authority...A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.

Midgett, 260 N.C. 241, 249-50, 132 S.E.2d 599, 608 (1963) (citing ***Sale v. Highway Commission***, 242 N.C. 612, 89 S.E.2d 290 (1955)). Therefore, in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. The

provision of our Constitution which protects the right of freedom of speech is self-executing. *See* ***Sale***, 242 N.C. 612, 89 S.E.2nd 290. Therefore, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right. *Id.*

This great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. ***Flake v. News Co.***, 212 N.C. 780, 790, 195 S.E. 55, 62 (1938). Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. *Id.* A direct action against the State for its violations of free speech is essential to the preservation of free speech.

The Civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action under the rationale adopted in the above-cited authorities. The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon the rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State. ***State v. Manuel***, 20 N.C. 144 (1838).

In ***Trustees of the University of North Carolina v. Foy***, 5 N.C. 57 (1805), the Court recognized the supremacy of rights protected in Article I and indicated that it would only apply the

rules of decision derived from the common law and such acts of the legislature that are consistent with the Constitution. This Court is the ultimate interpreter of our State Constitution. ***Bayard v. Singleton***, 1 N.C. (Mart.) 5 (1787).

It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. ***King v. South Jersey Nat. Bank***, 66 N.J. 161, 330 A.2d 1 (1974). Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. ***Lamb v. Wedgewood South Corp.***, 308 N.C. 419, 302 S.E.2d 868 (1983); Chief Justice James G. Exum, Jr., Dusting Off Our State Constitution, 33 State Bar Quarterly, No. 2 6-8 (1986). We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property. ***State v. Harris***, 216 N.C. 746, 6 S.E.2d 854 (1939).

This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. ***Sale***, 242 N.C. 612, 89 S.E.2d 290. Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights. *Id.* We conclude that plaintiff does have a direct cause of action under the State Constitution against defendant Durham in his official capacity for alleged violations of plaintiff's free speech rights.

The authorities in North Carolina are consistent with the decisions of the United States Supreme Court and decisions of other state supreme courts to the effect the officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated. *See. e.g.*, ***Bivens v. Six Unknown Agents***, 403 U.S. 388, 29 L. Ed. 2d 619 (1971); ***Bagg v. University of Tex. Medical***

Branch, 726 S.W.2d 582 (Tex. Ct. App. 1987); ***Widgeon v. Eastern Shore Hosp. Ctr.***, 300 Md. 520, 479 A.2d 921 (1984); ***Phillips v. Youth Dev. Programs, Inc.***, 390 Mass. 652, 459 N.E.2d 453 (1983); ***Schreiner v. McKenzie, Tank Lines & Risk Management Servs., Inc.***, 408 So.2d 711 (Fla. Dist. Ct. App. 1982), *approved* ***Schreiner v. McKenzie Tank Lines, Inc.*** 432 So.2d 567 (Fla. 1983); ***Fenton v. Groveland Community Servs. Dist.***, 135 Cal. App. 3d 797, 185. Cal. Rptr. 758 (1982); ***Lloyd v. Stone Harbor***, 179 N.J. Super, 496, 432 A.2d 572 (1981); ***Peper v. Princeton Univ. Bd. of Trustees***, 77 N.J. 55, 389 A. 2d 465 (1978); ***Walinski v. Morrison and Morrison***, 60 Ill. App. 3d 616, 377 N.E.2d 242 (1978). In ***Luguna Publishing Co. v. Golden Rain Found***, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), the court allowed damages for violations of plaintiff's constitutional free speech rights.

As stated, the common law provides a remedy for the violation of plaintiff's constitutionally protected right of free speech. What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to attempt to establish the redress recoverable in the event plaintiff is successful; however, such redress could consist of, *inter alia*, reinstatement to his prior status or a comparable status, with or without any loss of wages. Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case. When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. ***In re Alamance County Court Facilities***,

329 N.C. 84, 100-01, 405 S.E.2d 125, 133 (1991) (discussing and applying inherent powers of the judiciary). Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government--in appearance and in fact--by seeking the least intrusive remedy available and necessary to right the wrong. *Id.* In ***Sale***, we concluded: "[W]hen a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient." ***Sale***, 242 N.C. at 618, 89 S.E.2d at 296. Our conclusion there, however, was dictated by the absence of any other adequate remedy and the fact that, in ***Sale***, we were unable to fashion a common law remedy less intrusive than money damages which would correct the State's violation of the plaintiff's particular constitutional right at issue. *Id.*

Having determined that there is a direct claim against the State under the Declaration of Rights for the protection of plaintiff's free speech rights, we turn to the question of the relevance of the doctrine of sovereign immunity. The doctrine of sovereign immunity is judge-made in North Carolina and was first adopted by the North Carolina Supreme Court in ***Moffitt v. Asheville***, 103 N.C. 237, 9 S.E. 695 (1889). A brief history of the doctrine is found in ***Steelman v. City of New Bern***, 279 N.C. 589, 184 S.E.2d 239 (1971). The doctrine originated with the feudal concept that the king could do no wrong and culminated with its judicial recognition in the English case of ***Russell v. Men of Devon***, 2 T.R. 667, 100 Eng. Rep. R. 359 (1788). North Carolina adopted the common law of England as it existed in 1776. Sovereign immunity was not a part of the common law of England at that time because the holding of ***Men of Devon*** with respect to sovereign immunity was not promulgated until 1788. Accordingly, early North Carolina decisions expressly rejected the doctrine. ***Steelman***, 279 N.C. 589, 184 S.E.2d 239. Only with the ***Moffitt*** decision was sovereign immunity made a part of our law. It is, nevertheless, firmly established in the law of our State today

and has been recognized by the General Assembly as the public policy of the State. The doctrine of sovereign immunity has been modified, but never abolished. It has been said that the present day doctrine seems to rest on a respect for the positions of two coequal branches of government--the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity.

However, in determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

It is also to be noted that individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional rights are a part of the supreme law of the State. ***Ex. rel. Martin v. Preston***, 325 N.C. 438, 385 S.E.2d 473 (1989). On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court as hereinabove set forth. Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

Furthermore, this Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the

directions of the State. ***Lewis v. White***, 287 N.C. 625, 216 S.E.2d 134 (1975), *superseded on other grounds by statute as stated in,* ***State v. Williams and Hessee***, 53 N.C. App. 674, 281 S.E.2d 721 (1981); ***Schloss v. Highway Commission***, 230 N.C. 489, 53 S.E.2d 517 (1949). *Accord* ***Shingleton v. State***, 260 N.C. 451, 133 S.E.2d 183 (1963); ***Teer v. Jordan***, 232 N.C. 48, 59 S.E.2d 359 (1950); ***Pue v. Hood, Comr. of Banks***, 222 N.C. 310, 22 S.E.2d 896 (1942). Indeed, that is the very harm that the people sought to thwart by adopting the Declaration of Rights.

This, of course, does not mean that defendant has no defense to the action. Durham is entitled to all defenses that may arise upon the facts and law of the case.

For the foregoing reasons, we hold that plaintiff does have a direct cause of action under the State Constitution for alleged violations of his freedom of speech rights, guaranteed by Article I, Section 14.

We turn now to Thomas and Durham's petition for discretionary review of the decision of the Court Appeals holding that defendants' motion for summary judgment as to plaintiff's claims for monetary damages against Thomas and Durham, sued in their individual capacities, for alleged violations of plaintiff's constitutional free speech rights was properly denied by the trial court. By allowing this petition, we are now faced with the first impression issue of whether North Carolina recognizes a direct cause of action for monetary damages under the North Carolina Constitution against persons, sued only in their individual capacities, who allegedly violated a plaintiff's constitutional rights of freedom of speech. We answer the issue in the negative and hold that North Carolina does not recognize this cause of action.

In deciding this issue, the Court of Appeals made no analysis as to whether plaintiff had a direct cause of action against Thomas and Durham in their individual capacities, but only held

that the doctrine of sovereign immunity did not bar plaintiff's claim. We begin with an analysis of whether plaintiff has such direct action against these defendants sued in their individual capacities.

The Declaration of Rights was adopted by the people in 1776 in order to affirmatively reserve the rights of the people as well as to protect those rights from encroachment by the State. ***State v. Ballance***, 229 N.C. 764, 51 S.E.2d 731 (1949). In 1776 when the people of North Carolina established the State of North Carolina, they clearly and affirmatively set forth certain fundamental human rights which their government was bound to respect. Through the Declaration of Rights, the people of North Carolina secured these rights against state officials and shifting political majorities. The Declaration of Rights, Article I, Section 35 states: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. With that in mind, this Court considers the purpose for the Declaration of Rights, the language of Article I, Section 14 as well as the function and traditional role of the courts in North Carolina's constitutional democracy. The Declaration of Rights was intended to protect individual rights from infringement by the State. To that end, the Declaration of Rights expressed the rights it guarantees in clear and eplicit language.

As a matter of fundamental jurisprudence the Constitution itself does not recognize or create rights which may be asserted against individuals. Instead, the Constitution is the instrument by which "We, the people of the State of North Carolina," first acknowledge our individual rights and liberties and then create a government to better secure our enjoyment of those rights and liberties. The significant fact is that "We, the people," created the Constitution and the government of our State in order to limit our actions as the body politic. The Constitution is intended to protect our rights as individuals from our actions as the government. The

Constitution is not intended to protect our rights vis-a-vis other individuals.

From its earliest days, this Court has noted this essential feature of the Constitution. In ***Hoke v. Henderson***, 15 N.C. 1 (1833) then Chief Justice Ruffin, writing for the Court, expounded on the nature of constitutional government. Among many of the points relevant to this issue, Chief Justice Ruffin stated:

> In America, written Constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority, for the time being, have been established as securities of public liberty and private right.
>
> . . . .
>
> It is true, the whole community may modify the rights which persons can have in things, or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the *government* to abolish the right, or which restrains the *government* from depriving a particular citizen of it. In other words, *public liberty requires that private property should be protected even from the government itself.*

Id. at 9, 12 (emphasis added). In light of the purpose and language of the Constitution, plaintiff cannot rely on the Constitution to support a claim for money damages against individuals, acting in their personal capacities for the alleged violation of freedom of speech rights recognized under the Constitution. The Constitution only recognizes and secures an individual's rights vis-a-vis "We, the people of the State of North Carolina," not individual members of that body politic. Of course, the State may only act through its duly elected and appointed officials. Consequently, it

is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution. Therefore, plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity.

Although plaintiff's counsel at oral argument candidly admitted that plaintiff only sought relief against Thomas and Durham sued in their official status, we deemed it necessary to discuss the issue. We hold that plaintiff has no direct cause of action against Thomas or Durham sued in their *individual capacities* for alleged violations of plaintiff's constitutional freedom of speech rights. We reverse the Court of Appeals' holding to the contrary as to this issue.

We conclude that the Court of Appeals erred in applying the defense of sovereign immunity to plaintiff's claims under the State Constitution. However, plaintiff has filed to present a forecast of evidence sufficient to defeat the motion for summary judgment on behalf of ASU, UNC, President Spangler, and Chancellor Thomas as to plaintiff's state constitutional claims. Thus, the result reached by the Court of Appeals as to those defendants is affirmed. Plaintiff has, however, presented a sufficient forecast of evidence as to defendant Durham, sued in his official capacity, on this issue; therefore, the decision of the Court of Appeals as to Durham is reversed.

This holding completes the analysis of possible causes of action. Under section 1983, plaintiff has causes of action for:

1. Equitable relief against defendant Durham sued in his official capacity; and

2. Monetary damages against defendant Durham sued in his individual capacity.

Under the State Constitution, plaintiff has a direct cause of action against defendant Durham sued in his official capacity.

Thus, under 42 U.S.C. § 1983, plaintiff can only obtain prospective equitable relief against Durham sued in his official capacity and monetary damages against Durham sued in his individual capacity. Plaintiff cannot recover monetary damages under section 1983 against Durham sued in his official capacity. Therefore, plaintiff's right to sue Durham in his official capacity under the State Constitution completes his remedies. Plaintiff is not required to elect now, at summary judgment, among his remedies. N.C.G.S. 1A-1, Rule 18(a), (e)(2) (1983).

The decision of the Court of Appeals is affirmed in part, reversed in part, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Watauga County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

No. 8924SC120

NORTH CAROLINA COURT OF APPEALS

DR. ALVIS L. CORUM,

Plaintiff-Appellee

v.

Watauga County
No. 87CVS111

UNIVERSITY OF NORTH CAROLINA through its Board of Governors; C. D. SPANGLER, President of the UNIVERSITY OF NORTH CAROLINA in his official capacity; APPALACHIAN STATE UNIVERSITY; and JOHN THOMAS, Chancellor of APPALACHIAN STATE UNIVERSITY, and HARVEY DURHAM

FILED
March 20, 1990

Defendants

Appeal by defendants from order entered 21 October 1988 by Judge Marvin K. Gray in Watauga County Superior Court. Heard in the Court of Appeals 13 September 1989.

This is a civil action in which plaintiff seeks injunctive relief and compensatory damages from defendants for allegedly violating his constitutionally guaranteed right to freedom of speech in relieving him of his duties as Dean of Learning Resources at Appalachian State University. Defendants moved for summary judgment based on various legal theories including sovereign immunity and qualified immunity. After hearing arguments of counsel and reviewing documents submitted, the trial court entered an order denying defendants' motion for summary judgment. From this order, defendants appealed in apt time.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John W. Gresham, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Laura E. Crumpler and Thomas J. Ziko, for defendant-appellants.

JOHNSON, Judge.

Viewing the evidence in the light most favorable to plaintiff (the nonmoving party) as we are required to do, the evidence tends to show the following: For approximately fourteen years prior to June of 1984, plaintiff, Dr. Alvis Corum, held the position of Dean of Learning Resources at Appalachian State University ("ASU"). His duties included supervision of a diversified collection of books, manuscripts, and artifacts known as the Appalachian Collection (the "Collection"). In 1983, various ASU administrators began discussing the possibility of relocating the Collection from its present location in Dougherty Library because of the need to use that space for other purposes. The move was the subject of faculty debate and received attention in the campus newspaper. ASU Vice Chancellor for Academic Affairs Harvey Durham, a defendant in this action, was ultimately responsible for deciding where the Collection would be housed. Plaintiff, along with some other persons involved, felt strongly that the Collection should not be split in two, with the artifacts being separated from the written materials. He expressed this view to defendant Durham on occasion. During a meeting on 21 June 1984, defendant Durham informed plaintiff that the Collection would be moved immediately to University Hall and that responsibility for the Collection would be transferred to another department.

Plaintiff accepted the decision and set up a meeting, as requested by defendant Durham, to work out details of the move. This meeting, which occurred on 25 June, was attended by plaintiff, two ASU librarians, and Dr. Clinton Parker, Associate

Vice Chancellor of Academic Affairs who attended as defendant Durham's representative.

Dr. Parker announced at the meeting that the artifacts and written materials would be moved to two separate ASU locations. The next day a second meeting was held. Exactly what took place at this meeting is somewhat in dispute. It appears, however, that plaintiff proposed an alternative relocation plan in which the entire Collection would be housed in one location. Dr. Parker stated that he did not have the authority to entertain an alternative proposal, but agreed to relay the plan to defendant Durham.

Dr. Parker relayed the proposal to defendant Durham by telephone that evening. The following morning defendant Durham removed plaintiff from his position as Dean of Learning Resources. Plaintiff retained his position as a tenured faculty member.

Before turning to the merits of this case, we are obliged to address a threshold issue not raised in the briefs of either party, namely, the appealability of the denial of a summary judgment motion. Generally, the denial of summary judgment does not affect a substantial right and is not appealable. ***Hill v. Smith***, 38 N.C.App. 625, 248 S.E.2d 455 (1978); ***Oil Co. v. Smith***, 34 N.C.App. 324, 237 S.E.2d 882 (1977). In the instant case, however, we hold that the denial of summary judgment affected a substantial right and is subject to review. We reach this conclusion in light of the holding of the United States Supreme Court in ***Mitchell v. Forsyth***, 472 U.S. 511, 86 L.Ed.2d 411 (1985), a case in which the defendant federal official's summary judgment motions, on the grounds of absolute and qualified immunity, had been denied in District court. In ***Mitchell***, the Supreme Court held that "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525, 86

L.Ed.2d at 424 (citations omitted.) Similarly, the Court concluded that denial of a public official's claim of qualified immunity from suit, to the extent that it turns on the legal questions of whether the conduct complained of violated "clearly established law" (a standard set forth in ***Harlow v. Fitzgerald***, 457 U.S. 800, 73 L.Ed.2d 396 (1982)), is also appealable as a "final decision" within the meaning of 28 U.S.C. sec. 1291. In so holding, the Court stated that

> entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.
>
> An appealable interlocutory decision must satisfy two additional criteria: it must "conclusively determine the disputed question," ***Coopers & Lybrand v. Livesay***, 437 US 463, 468, 57 LEd2d 351, 98 S.Ct. 2454 (1978), and that question must involve a "clai[m] of right separable from, and collateral to, rights asserted in the action," [***Cohen v. Beneficial Industrial Loan Corp.***, 337 U.S. 541, 546, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949).] The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements.

472 U.S. at 526-27, 86 L.Ed.2d at 425-26.

In the case *sub judice*, the defendants advance a substantial claim of absolute immunity as well as qualified immunity as grounds for their summary judgment motion. Further, the qualified immunity argument turns on the issue of whether "clearly established law" has been violated. ***Harlow***, *supra*. In accord with ***Mitchell v. Forsyth***, these contentions, if successful, entitle defendants to "immunity from suit rather than a mere defense to liability." ***Mitchell***, *supra*. They could not, therefore, be vindicated after a trial and are appealable at this stage. We do not find it distinguishable that the defendants in the instant case are asserting state rather than federal immunities. We therefore hold that denial of defendants' summary judgment motion on the grounds of sovereign and qualified immunity is immediately appealable.

We first address defendants' assignment of error that the trial court erred in denying their summary judgment motion on grounds of sovereign immunity. Plaintiff's complaint alleges that defendants violated 42 U.S.C. sec. 1983 and that they violated plaintiff's right to freedom of speech as guaranteed by the North Carolina Constitution. In addition to defendants UNC and ASU, named in plaintiff's complaint, defendant Spangler has been sued in his official capacity only, while defendants Thomas and Durham have been sued in both their official and individual capacities.

We find that many of the issues raised in this assignment of error have previously been addressed by this Court in ***Truesdale v. University of North Carolina***, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229 (1989), and we are bound by the holding of ***Truesdale***.

The doctrine of sovereign immunity prevents the State or its agencies from being sued without its consent. *Id.* The ***Truesdale*** Court observed that G.S. sec. 116-3 allows UNC and its constituent institutions to sue and be sued, but only as specif-

ically provided by law. It further concluded that the action brought pursuant to 42 U.S.C. sec. 1983 against UNC and Winston-Salem State University was barred by the doctrine of sovereign immunity. We find this holding applicable to the facts of the instant case and hold that the trial court erred in denying defendants' motion for summary judgment as to defendants UNC and ASU regarding the 42 U.S.C. sec. 1983 cause of action.

We are unpersuaded that the case *sub judice* is controlled by ***Smith v. State***, 289 N.C. 303, 222 S.E.2d 412 (1976), in which our Supreme Court abolished the defense of sovereign immunity in breach of contract actions. Plaintiff's action is based upon defendants' alleged violations of his constitutional rights. Plaintiff's complaint makes no reference to any employment contract or allegation that one was breached. We do not believe that statements in plaintiff's brief that he served as Dean pursuant to a contract is sufficient to bring this case under the rule of ***Smith v. State*** when the action is clearly based on alleged constitutional violations and plaintiff's complaint makes no mention of a contract.

We turn now to the issue of whether plaintiff's claim for monetary damages, including back pay, against *individual* defendants Spangler, Thomas and Durham, named in th*eir official capacities*, is barred by sovereign immunity. Again, pursuant to ***Truesdale***, *supra*, we hold that this action is barred. The rationale for this is that an action against a State employee in his official capacity for monetary damages would actually be an award against the State since the award would be paid from the State treasury. ***Insurance Co. v. Unemployment Compensation Com.***, 217 N.C. 495, 8 S.E.2d 619 (1940); ***Truesdale***, *supra*, at 193, 371 S.E.2d at 507.

As to these same three defendants in their official capacities, however, plaintiff's section 1983 claim, as it relates to prospective injunctive relief, is not barred by sovereign immunity.

Id. at 194-95, 371 S.E.2d at 508. In this situation, sovereign immunity is pre-empted by federal law, ***Felder v. Casey***, 487 U.S. 131, 101 L.Ed.2d 123 (1988), so that the outcomes of section 1983 actions will not vary predictably with whether the action was brought in state or federal court. *Id.* This issue is more fully treated in ***Truesdale*** and need not be repeated here.

We turn now to the issue of denial of summary judgment concerning monetary awards against defendants Thomas and Durham named in their individual capacities. It is recognized that governmental officials sued in their individual capacities under section 1983 may be liable for damages. ***Kentucky v. Graham***, 473 U.S. 159, 87 L.Ed.2d 114 (1985). Such officials may, however, raise the defense of *qualified immunity*. ***Harlow v. Fitzgerald***, *supra*. The United States Supreme Court has stated that

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citations omitted.]
>
> . . .On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was *clearly established* at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 818, 73 L.Ed.2d at 410-11 (emphasis added).

The Court has further described a "clearly established" right by stating that

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, *see* ***Mitchell*** [***v. Forsyth***], 472 U.S. 511, 535 n. 12, 86 L.Ed.2d 411, 105 S.Ct. 2806; *but it is to say that in light of preexisting law the unlawfulness must be apparent.*

Anderson v. Creighton, 483 U.S. 635, 640, 97 L.Ed.2d 523, 531 (1987) (emphasis added).

In the case *sub judice*, plaintiff alleges that he was relieved of his duties as Dean because of the statements he made at the 26 June 1984 staff meeting in which he proposed an alternative relocation plan. He asserts that this discharge violated his guaranteed right of free speech. To determine whether defendants violated a "clearly established" right of which a reasonable person would have known, we examine the substantive law applicable to plaintiff's claim. The Supreme Court has set forth the necessary elements for a state employee's section 1983 action for violation of freedom of speech in ***Connick v. Myers***, 461 U.S. 138, 75 L.Ed.2d 708 (1983). In that case, the Court stated that the first issue is whether "an employee's speech addresses a matter of public concern" and this must be "determined by the content, form, and context" of the statement in question. *Id.* at 147, 75 L.Ed.2d at 720. If the speech does comment on a matter of public concern, then the court must balance the employee's interest as a citizen in commenting on the public issue against "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150, 75 L.Ed.2d at 722; ***Pickering v. Board of Education***, 391 U.S. 563, 20 L.Ed.2d 811 (1968).

It is unnecessary to the disposition of the qualified immunity issue before us to fully apply the criteria of ***Connick*** to the instant case and we decline to do so. We shall, however, examine the process sufficiently to determine whether qualified immunity exists.

On review of denial of defendants' summary judgment motion, we are obliged to view the record in the light most favorable to the nonmoving party, the plaintiff, giving him the benefit of all reasonable inferences. ***Bradshaw v. McElroy***, 62 N.C.App. 515, 302 S.E.2d 908 (1983). In doing this, we conclude, for purposes of evaluating the summary judgment motion only, that the relocation of the Appalachian Collection was an issue of some public interest to the local community. Further, for purposes of this analysis only, we may resolve the conflicting allegations of the parties and conclude that plaintiff was discharged in order to prevent him from raising public concerns about the move, rather than for insubordination as defendants assert.

Upon concluding that plaintiff's comments addressed a public issue, we turn to the second prong of the ***Connick*** test, whether plaintiff's interest in commenting on the relocation of the Collection is outweighed by the State's interest in the efficient provision of services to the public. The Court in ***Connick*** listed several factors to be considered in balancing the complex interests in a given case. These include the manner, time and place in which the statement is made; the context in which the dispute arose; and whether the employee's speech could reasonably be viewed by the supervisor as threatening his authority to run the office. ***Connick***, *supra*. In the instant case, plaintiff's statement was made in a small faculty meeting rather than in a forum in which the general public would hear his statement. It was also made after plans for the move had been going on for months and the move itself was imminent. On the other hand, plaintiff asserts that the final decision to divide the Collection had purposely been

concealed until the eleventh hour in hopes of avoiding the type of statement plaintiff made. In fact, a memo circulated by defendant Durham just prior to the announcement (believed by plaintiff to be a final decision) stated the Collection would remain intact.

These and other factors must weigh in the balance to determine whether plaintiff's right to speak out was outweighed by ASU's need for efficient provision of service to the public. Although we decline to reach a final balance of interests under ***Connick***, *supra*, we believe the recitation of some of the factors involved shows the complexity of balancing the interests to determine whether plaintiff's rights were violated. It is apparent to us that when defendants acted they were not violating a "clearly established" right of which a reasonable person would have known. Therefore, the trial court erred in denying defendants' motion for summary judgment as it concerns possible monetary awards against defendants Thomas and Durham named in their individual capacities pursuant to 42 U.S.C. sec. 1983.

Last, we address the denial of defendants' summary judgment motion as it concerns plaintiff's claims for violations of his right to free speech as protected by Article I, sections 14, 19 and 35 of the North Carolina Constitution. Defendants contend that this action is barred by sovereign immunity. Our Supreme Court found it unnecessary to reach a state constitutional issue in the recent case of ***Harwood v. Johnson***, No. 37PH89 (N.C. filed 7 Feb. 1990), in which the plaintiff had stated a claim for relief under 42 U.S.C. sec. 1983. We believe the case before us is distinguishable from ***Harwood*** since plaintiff Corum has at least the possibility of obtaining a different type of relief, namely monetary damages, under our State Constitution than he may be entitled to under our analysis of his section 1983 claim.

The doctrine of sovereign immunity--that the State may not be sued without its consent--is firmly rooted in the jurisprudence of North Carolina. ***Harwood v. Johnson***, *supra*; ***Orange***

County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972); ***Electric Co. v. Turner***, 275 N.C. 493, 168 S.E.2d 385 (1969); ***Schloss v. Highway Commission***, 230 N.C. 489, 53 S.E.2d 517 (1949). Also, an action brought against individual state officers or employees in their official capacities is considered to be an action against the State for purposes of applying the doctrine of sovereign immunity. ***Insurance Co. v. Unemployment Compensation Com.***, *supra*.

We turn now to the question of whether the two defendants named in their individual capacities are protected from plaintiff's state action for monetary damages.

> [Our Supreme] Court said in ***Smith v. Hefner***, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952), "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable *unless it be alleged and proved* that his act, or failure to act, was corrupt or malicious (cites omitted), or that he acted outside of and beyond the scope of his duties." (Emphasis added.) As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. ***Carpenter v. Atlanta & C.A.L. Ry.***, 184 N.C. 400, 406, 114 S.E. 693, 696 (1922). As to the personal liability of a governor, see 28 Am. Jur. 2d Governor [sec] 11 (1968).

Smith v. State, *supra*, at 331, 222 S.E.2d at 430; *See also* ***Mazzucco v. Board of Medical Examiners***, 31 N.C.App. 47, 228

S.E.2d 529, *disc. rev. denied*, 291 N.C. 323, 230 S.E.2d 676 (1976).

In the instant case, plaintiff has alleged and come forward with some evidence that the two defendants acted in violation of law, and therefore outside the scope of their duties in discharging plaintiff. The defendants have failed to disprove plaintiff's claim as a matter of law. We express no opinion whatsoever as to whose version of events and motivation is correct. However, viewing the record in the light most favorable to plaintiff as we must in this posture, we cannot say, as a matter of law, that plaintiff would be unable at trial to prove a set of facts which would entitle him to relief from defendants. We therefore hold that the two individually named defendants are not immune from a suit for monetary damages.

In summary, we hold that concerning plaintiff's 42 U.S.C. sec. 1983 claim, the trial court erred in denying defendants' summary judgment motion except as it pertained to plaintiff's claim against individual defendants Spangler, Thomas and Durham named in their official capacities, for prospective injunctive relief only. As to plaintiff's State Constitutional claim, the trial court erred in failing to grant defendants' motion as to UNC, ASU, and the three individual defendants in their official capacities as to all relief. The motion was properly denied as it concerned plaintiff's claims for monetary damages against the two individually named defendants for violation of plaintiff's State Constitutional rights.

Affirmed in part; reversed in part and remanded.

Judge EAGLES concurs.

JUDGE GREENE concurs in part and dissents in part.

No. 8924SC120

NORTH CAROLINA COURT OF APPEALS

DR. ALVIS L. CORUM

v.

Watauga County
No. 87CVS111

UNIVERSITY OF NORTH CAROLINA through its Board of Governors; C. D. SPANGLER, President of the UNIVERSITY OF NORTH CAROLINA in his official capacity; APPALACHIAN STATE UNIVERSITY; and JOHN THOMAS, Chancellor of APPALACHIAN STATE UNIVERSITY, and HARVEY DURHAM

FILED
March 20, 1990

Judge GREENE concurring in part and dissenting in part.

On the § 1983 claims, for the reasons hereafter asserted in Part I, I agree with the majority that plaintiff should be allowed to proceed to trial only on his claims against Spangler, Thomas and Durham in their official capacities for prospective injunctive relief and that summary judgment should be entered for defendants on the remaining § 1983 claims. On the state constitutional claims, I agree with the majority that the plaintiff should be allowed to proceed to trial on his claims against Thomas and Durham in their individual capacities for monetary relief. With the exception of the plaintiff's claims against Spangler, Thomas and Durham in their official capacities for prospective injunctive relief, I also agree with the majority that summary judgment should be entered for defendants on the remaining claims asserted

pursuant to the state constitution. As to the claims against Spangler, Thomas and Durham in their official capacities for prospective injunctive relief, I disagree with the majority and am of the opinion that those claims should not be dismissed for the reasons hereafter asserted in Part I.

I

Section 1983 Claims

The § 1983 action against UNC and Appalachian State University, and the § 1983 action against Spangler, Thomas and Durham in their official capacities for monetary relief, must be dismissed as they are not "persons" within the meaning of § 1983 and therefore are not subject to § 1983 liability. ***Will v. Michigan Dept. of State Police***, 491 U.S. ---, 105 L.Ed.2d 45, 58 (1989). However, Spangler, Thomas and Durham sued in their official capacities, are "persons" within the meaning of § 1983 to the extent that injunctive relief is sought, since "official-capacity actions for prospective relief are not treated as actions against the state." ***Will***, 491 U.S. at ---, 105 L.Ed.2d at 58, n.10. Furthermore, the § 1983 state action against Spangler, Thomas and Durham in their official capacities for injunctive relief is not barred by either the Eleventh Amendment, S. Steinglass, Litigation in State Courts § 15.3(b), at 15-30 (Eleventh Amendment is "a subject matter jurisdictional limitation on the power of the *federal courts*" (emphasis added)) or by state sovereign immunity. ***Martinez v. California***, 444 U.S. 277, 283, 62 L.Ed.2d 481, 488, *rehearing denied*, 445 U.S. 920, 63 L.Ed.2d 606 (1980) (state created immunities cannot be used to limit liability in § 1983 actions filed in state courts).

A § 1983 action against Thomas and Durham in their individual capacities could be asserted for monetary damages, subject however to their qualified immunity that was pled by the defendants, as defined in ***Harlow v. Fitzgerald***, 457 U.S. 800, 73 L.Ed.2d 396 (1982). While ***Harlow*** arose from a § 1983 action

filed in federal court, that same standard should nonetheless apply in a § 1983 action filed in state court. To hold otherwise would result in the possibility of fifty different standards for qualified immunity for § 1983 actions filed in state courts. *See* ***Felder v. Casey***, 487 U.S. 131, 101 L.Ed.2d 123, 138 (1988) ("state law is pre-empted when the § 1983 action is brought in state court," as outcome should not depend on whether action is filed in state or federal court). The ***Harlow*** standard is one of "objective reasonableness." ***Harlow***, 457 U.S. at 818, 73 L.Ed.2d at 410. The official conduct is immunized if the "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* While the plaintiff's constitutional right of free speech, allegedly infringed upon by the defendants, is in a general sense "clearly established," that right of free speech, requiring application of a balancing test, ***Connick v. Myers***, 461 U.S. 138, 150-51, 75 L.Ed.2d 708, 722 (1983), is not "clearly established" in a "more particularized . . . sense" as required by ***Anderson v. Creighton***, 483 U.S. 635, 640, 97 L.Ed.2d 523, 531 (1987).

II

N.C. Constitutional Claims

In plaintiff's second claim, he asserts a private right of action under the North Carolina Constitution. While North Carolina does not have an enabling statute similar to § 1983 authorizing remedies for the violation of the North Carolina Constitution by state officials acting under color of state law, such private actions are generally recognized as a constitutional tort giving rise to common law remedies. *See* ***Bevins v. Six Unknown Federal Narcotics Agents***, 403 U.S. 388, 29 L.Ed.2d 619 (1971); ***Figueroa v. State***, 604 P.2d 1198 (Hawaii 1988). To deny such a claim would deny the plaintiff the "very essence of civil liberty" which entitles "every individual to claim the protection of the laws, whenever he receives an injury." ***Marbury v. Madison***, 5 U.S. 137, 163, 2 L.Ed. 60, 69 (1803). However, such private actions

for monetary relief against the state or its officials acting in their official capacities are barred by sovereign immunity. *See* ***Lewis v. White***, 287 N.C. 625, 642-43, 216 S.E.2d 134, 145-46 (1975). Nonetheless, in this ***Bevins***-type action which is similar to § 1983 actions, injunctive relief is allowed against state officials sued in their official capacities who, acting under color of state law, "invade the personal or property rights of citizens *in disregard of law*." *Id.* To hold otherwise would permit unlawful action by state officials and relegate the plaintiff to the possibility of only a monetary judgment against an individual. *See* ***Lewis***, 287 N.C. at 644, 216 S.E.2d at 146-47 (injunction permitted to restrain state officials from making illegal diversion of public funds); ***Smith v. State***, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (monetary relief available against officials acting under color of state law and sued in their individual capacity if acting with corrupt purposes, with malice or outside of or beyond the scope of their duties).

III

As our Rules of Civil Procedure permit parties to assert inconsistent and alternative pleadings and claims, plaintiff should not be required to elect at this stage of the proceeding between his § 1983 claims and his state constitutional claims, even to the extent that they seek the same remedies. *See* ***Alpar v. Weyerhaeuser Co.***, 20 N.C.App. 340, 344, 201 S.E.2d 503, 506, **cert. denied**, 285 N.C. 85, 203 S.E.2d 57 (1974); *see also* N.C.G.S. § 1A-1, Rule 18(a) ("A party asserting a claim for relief as an original claim . . . may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party."); N.C.G.S. § 1A-1, Rule 8(e)(2) (1983) (alternative and inconsistent pleadings permitted).

No. 163PA90 **TWENTY-FOURTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

DR. ALVIS L. CORUM	)	
	)	
v.	)	From Watauga
	)	(8924SC120)
	)	
UNIVERSITY OF NORTH CAROLINA through its Board of Governors; C. D. SPANGLER, President of the UNIVERSITY OF NORTH CAROLINA in his official capacity; APPALACHIAN STATE UNIVERSITY; and JOHN THOMAS, Chancellor of APPALACHIAN STATE UNIVERSITY, and HARVEY DURHAM	)	

****

ORDER

Upon consideration of the petition filed by Defendants in this matter for rehearing of the decision of this Court pursuant to Rule 31, N. C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this
the 24th day of June 1992.

s/Lake, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of June 1992.

CHRISTIE SPEIR PRICE
Clerk of Supreme Court

s/Peggy N. Byrd
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Thomas J. Ziko, Special Deputy Attorney General,
For the Defendants
Ms. Norma Harrell, Special Deputy Attorney General,
For the Defendants
Mr. John W. Gresham, Attorney at Law, For the Plaintiff
Mr. Ralph A. White, Appellate Court Reporter
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STATE OF NORTH CAROLINA COUNTY OF WATAUGA	GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 87 CVS
ALVIS CORUM, Plaintiff,) v. UNIVERSITY OF NORTH CAROLINA through its Board of Governors; C. D. SPANGLER, President of the UNIVERSITY OF NORTH CAROLINA in his official capacity; APPALACHIAN STATE UNIVERSITY; and JOHN THOMAS, Chancellor of APPALACHIAN STATEUNIVERSITY, and HARVEY DURHAM.	COMPLAINT (JURY TRIAL DEMANDED) FILED Feb 20 1987

COMPLAINT

1. Plaintiff is an adult citizen of the United States residing in Watauga County, North Carolina.

2. The University of North Carolina is a body corporate and politic of the State of North Carolina with its principal place of business in Orange County, North Carolina, and can be sued in its own name.

3. Defendant, C. D. Spangler, is the President of the University of North Carolina and is a citizen and resident of Orange County, North Carolina. In his official capacity, he is charged with the responsibility of directing the University in compliance with the laws and Constitution of the United States, and the laws and Constitution of North Carolina.

4. Appalachian State University is a constituent institution of the University of North Carolina and is a body corporate and politic of the State of North Carolina. Appalachian State University is located in Watauga County, North Carolina, and can be sued in its own name.

5. Defendant, John Thomas, is the Chancellor of Appalachian State University and is a citizen and resident of Watauga County, North Carolina. He is sued in his official and individual capacity. In his official capacity, he is charged with the responsibility of directing Appalachian State University in compliance with the laws and the Constitution of North Carolina and the laws and Constitution of the United States.

6. Defendant, Harvey Durham, is the Vice Chancellor for Academic Affairs at Appalachian State University, and is a citizen and resident of Watauga County, North Carolina. He is sued in his official and individual capacity. In his official capacity, he is charged with complying with the laws and the Constitution of North Carolina and the laws and Constitution of the United States.

7. Plaintiff was first employed by defendant Appalachian State University (ASU) in 1970 as the Dean of Learning Resources. Plaintiff held this position until June 27, 1984, when he was relieved of his duties by a Vice Chancellor of ASU, Dr. Harvey Durham.

8. In 1983, Dr. Durham had proposed a move of the Appalachian Collection, an accumulation of over ten thousand books, numerous recordings and artifacts concerning Appalachian culture. The new location was ro be more than one mile from the center of the main campus of ASU.

9. Plaintiff had been active during his employment in gathering material for the Collection. In addition, plaintiff had overall responsibility for the Collection.

10. The issue of whether the Appalachian Collection should be moved was one of public concern. Articles appeared in "The Appalachian" newspaper concerning the move, there were letters to the editor opposing the move and faculty debate over the move. Articles concerning the move also appeared in local newspapers.

11. Plaintiff took public positions regarding the move which were contrary to the positions espoused by Dr. Durham and the ASU administration.

12. In June of 1984 a final decision was made to move the Collection.

13. When informed of the move by Dr. Harvey Durham, plaintiff accepted the decision and began to undertake the steps necessary for the move.

14. In working with other members of the faculty and staff of ASU, plaintiff determined that some clarification was needed to reconcile what had been told plaintiff by Dr. Durham and subsequent conflicting instructions given to plaintiff by Dr. Clinton Parker.

15. Plaintiff was initially informed by Dr. Parker that would be communicated to Dr. his request for clarification Durham.

16. Instead, Dr. Corum was subsequently informed that he was being relieved of his duties for "gross insubordination".
17. At no time had plaintiff been insubordinate.

18. The charge of gross insubordination was a pretext used to cover up the actual reason for stripping plaintiff of his position.

19. The actual reasons were: a) retaliation for plaintiff having spoken out in opposition to the positions taken by Dr. Durham and the administration of ASU with regard to the Appalachian Collection, and (b) to chill further opposition to the administration's actions with regard to the Collection.

20. Subsequent to his demotion, plaintiff has been further retaliated against by the denial of annual salary increases.

21. In addition to losses in salary and compensation, plaintiff has suffered loss of professional reputation and . additionally the defendants' actions have caused plaintiff great pain and suffering.

22. The University of North Carolina is charged with the legal responsibility of obtaining comFliance by its constituent Universities with federal and state law. It has knowledge of ASU's violations but has failed to take any action to bring the constituent University into compliance.

STATE CLAIMS

23. Defendants' actions as set out herein violate plaintiff's rights under Article I, §14, & §19, §35 of the Constitution of North Carolina.

FEDERAL CLAIM

24. In relieving plaintiff of his duties as Dean and in denying plaintiff salary increases in retaliation for plaintiff having exercised his First Amendment rights, defendants violated plaintiff's rights protected by the First and Fourteenth Amendments of the Constitutien of the United States. Such acts are in violation of 42 U.S.C. § 1983.

WHEREFORE, plaintiff respectfully prays the Court to:

A. Grant plaintiff's request for a jury trial.

B. Issue a preliminary and permanent injunction enjoining the defendants, their agents, successors, employees, attorneys and those acting in concert with them and at their discretion from engaging in the unlawful practices shown to be in violation of the applicable law.

C. Grant to the plaintiff such other and further equitable relief as may be just and proper including reinstatement, promotion, compensatory pay, including back pay and compensatory seniority.

D. Award plaintiff his actual damages for the acts of defendants.

E. Award plaintiff his costs herein, including his reasonable attorneys' fees and expenses.

S/John W. Gresham_____
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(704) 375-8461

STATE OF NORTH CAROLINA

WATAUGA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 87 CVS 111

DR. ALVIS L. CORUM	)	
	)	
Plaintiff	)	
	)	
v.	)	**ANSWER**
	)	
UNIVERSITY OF NORTH CAROLINA, et al.	)	FILED APR 23 1987
	)	
Defendants	)	

Defendants, answering Plaintiff's Complaint, allege and say as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be - granted and should be dismissed.

SECOND DEFENSE

Defendants respond to the numbered paragraphs of the Complaint as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. It is admitted that Appalachian State University is a constituent institution of the University of North Carolina pursuant to G.S. 116-4. Except as otherwise herein admitted, the allegations contained in paragraph 4 of the Complaint are denied.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. It is admitted that the question of whether to move the Appalachian Collection received some attention in the campus newspaper and that there was faculty debate about the issue; however, it is specifically denied that the issue was one of public concern. Defendants are without sufficient knowledge upon which to form a belief as to whether local newspapers featured articles concerning the move and therefore deny that allegation. Except as admitted, the remaining allegations contained in paragraph 10 are denied.

11. It is admitted that on some occasions, Plaintiff took positions different from those taken by Defendants Durham and the administration of Appalachian State University. Except as admitted, the allegations contained in paragraph 11 of the Complaint are denied. It is specifically denied that Plaintiff took public positions of any kind.

12. Admitted.

13. It is admitted that, when informed of the 21 June 1984 decision to move the Appalachian Collection to University Hall,

Plaintiff indicated his support and approval, and did not indicate otherwise until 26 June 1984.

14. Defendants are without knowledge and information sufficient to form a belief as to the truthfulness of the allegations contained in paragraph 14 of the Complaint and therefore deny them.

15. It is admitted that Dr. Parker indicated his intention to call Defendant Durham following the 26 June 1984 meeting and did call Dr. Durham. Except as specifically admitted, the allegations contained in paragraph 15 of the Complaint are denied.

16. It is admitted that Dr. Corum was informed that his actions in refusing to accept or carry out the decision of the Vice Chancellor constituted gross insubordination. Except as specifically admitted, the allegations contained in paragraph 16 are denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. The legal responsibilities of the University of North Carolina are set forth in Chapter 116 of the General Statutes. Except as otherwise admitted herein, the allegations set forth in paragraph 22 are denied.

23. Denied.

24. Denied.

THIRD DEFENSE

25. The Court lacks subject matter jurisdiction over the causes of action alleged in the complaint on grounds that Plaintiff has failed to exhaust his administrative remedies pursuant to Article 4, Chapter 150B of the General Statutes.

FOURTH DEFENSE

26. Plaintiff failed to pursue an appeal of the administrative decision of the Board of Governors pursuant to Article 4 of Chapter 150B of the General Statutes and defendants are therefore entitled to defenses of res judicata and collateral estoppel.

FIFTH DEFENSE

27. The defendants are agents or agencies of the State of North Carolina and are therefore entitled to sovereign immunity.

FIFTH DEFENSE

28. The individual defendants are entitled to qualified immunity for their actions.

WHEREFORE, the defendants pray that:

1. The Complaint against defendants be dismissed;

2. The plaintiff have and recover nothing of the defendants;

3. The defendants be awarded reasonable attorney's fees;

4. The costs of this action be taxed against the plaintiff; and 5. For such other relief as to the Court seems just and proper.

This the 22 day of April 1987.

LACY H. THORNBURG
Attorney General

S/Laura E. Crumpler
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STATE OF NORTH CAROLINA

SUPERIOR COURT DIVISION

IN THE GENERAL COURT OF JUSTICE
WATAUGA COUNTY
File No. 87 CVS 111

DR. ALVIS L. CORUM
Plaintiff

v.

UNIVERSITY OF NORTH CAROLINA, et al.
Defendants

MOTION FOR SUMMARY JUDGMENT

Defendants move, pursuant to Rule 56 of the Rules of Civil Procedure for summary judgment in their behalf on grounds that there is no genuine issue of material fact and they are entitled to judgment as a matter of law.

WHEREFORE, defendants pray that the Court enter judgment in their behalf.

This 27 day of June, 1988.

LACY H. THORNBURG
Attorney General

s/ Thomas J. Ziko
Thomas J. Ziko
Assistant Attorney General

s/Laura E. Crumpler
Laura E. Crumpler
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STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	WATAUGA
SUPERIOR COURT DIVISION	87-CVS-111

DR. ALVIS L. CORUM,	)	
	)	
Plaintiff	)	
	)	
v.	)	ORDER
	)	
UNIVERSITY OF NORTH CAROLINA, et al.,	)	
	)	
Defendants	)	

The defendants' Motion for Summary Judgment was heard by the undersigned in Charlotte, North Carolina, on September 15, 1988, by agreement of the parties. John Gresham, Esquire, appeared for the plaintiff and Laura E. Crumpler of the Attorney General's office appeared for the defendants.

The Court heard argument of counsel, reviewed and considered affidavits and transcripts of depositions and reviewed and considered cases cited by the parties in support of their respective positions.

The Court, having fully considered the matter is of the opinion that the defendants' Motion for Summary Judgment ought to be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants' Motion for Summary Judgment be, and the same hereby is, denied.

The parties, through counsel, in open court, agreed that this Order may be signed out of Term and out of District.

This the 21st day of October, 1988.

s/Marvin K. Gray
Marvin K. Gray
Special Superior Court Judge

STATE OF NORTH CAROLINA
SUPERIOR COURT DIVISION

IN THE GENERAL COURT OF JUSTICE
WATAUGA COUNTY
File No. 87 CVS 111

DR. ALVIS L. CORUM,
Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Defendants.

NOTICE OF APPEAL

Defendants hereby give Notice of Appeal from the order of The Honorable Marvin K. Gray, entered 25 October 1988 denying defendants' motion for summary judgment. ***Harlow v. Fitzgerald***, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982); ***Mitchell v. Forsyth***, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985).

This 2 day of November, 1988.

LACY H. THORNBURG
Attorney General

s/Laura E. Crumpler
Laura E. Crumpler
Assistant Attorney General

s/ Thomas J. Ziko
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FILED
OCT 26 1992
OFFICE OF THE CLERK

No. 92-536

In The

Supreme Court of the United States

OCTOBER TERM, 1992

HARVEY DURHAM,

Petitioner,

v.

DR. ALVIS L. CORUM,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

ARE THERE ADEQUATE AND INDEPENDENT STATE GROUNDS TO SUPPORT THE JUDGMENT OF THE NORTH CAROLINA SUPREME COURT?

DID THE SUPREME COURT OF NORTH CAROLINA CORRECTLY APPLY THE DOCTRINE OF QUALIFIED IMMUNITY TO A CASE WHERE THE STATE OF MIND OF THE DEFENDANT IS AN ESSENTIAL ELEMENT OF THE CONSTITUTIONAL RIGHT ALLEGEDLY VIOLATED?

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No. 92-536

In The

Supreme Court of the United States

OCTOBER TERM, 1992

HARVEY DURHAM,

Petitioner,

v.

DR. ALVIS L. CORUM,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The Respondent contends that this Court does not have jurisdiction over this matter. In addition to rejecting the petitioner's defense of qualified immunity, the Supreme Court of North Carolina determined that the respondent had an independent cause of action under the North Carolina Constitution for violation of his free expression rights. Thus, there was an independent and adequate state ground to support the judgment below so that this Court's review could amount to nothing more than an advisory opinion.

STATEMENT OF THE CASE

In June of 1984, Dr. Alvis Corum was completing his fourteenth year as the Dean of Learning Resources of Appalachian State University. As dean, Dr. Corum supervised the University's academic support units including the library, audio-visual services, and the Appalachian Collection, a diversified collection of books, research reports, music scores and over three hundred artifacts representing the mountain culture of the southern Appalachian region. Some of the artifacts were owned by the University; the remainder were on loan from private citizens. Because some of the privately owned artifacts had previously sustained damage for which the University had compensated the owners, University officials were aware of the need to take precautions in safeguarding the collection.

During the 1983-84 academic year the possibility of relocating the Appalachian Collection from one of the library buildings on campus was first discussed. Harvey Durham, as Vice Chancellor for Academic Affairs, was responsible for the decisions regarding the location of the collection. During the academic year the possible move of the collection was the subject of faculty debate and received attention in the campus newspaper. During the discussion primary concerns raised by Dr. Corum and others were the need to maintain the integrity of the collection and the need to ensure its security. By June of 1984, Dr. Durham had decided that the artifacts were going to be split from the rest of the collection. However, Dr. Durham deliberately misrepresented this fact to Dr. Corum during a meeting on June 21, 1984. In this meeting, and by memo, Dr. Durham misadvised Dr. Corum

that the entire collection was to be moved immediately to University Hall, a facility some distance from the main Appalachian State University Campus. Dr. Durham also told Dr. Corum that the organizational responsibility for the collection would be transferred to another department.

While Dr. Corum expressed concern over these transfers, he accepted the decision regarding the collection as one which was workable because it maintained the integrity and security of the collection and the meeting between Dr. Durham and Dr. Corum was cordial and businesslike. Subsequent to his meeting with Dr. Durham, Dr. Corum met with library staff members to advise them of the decision and prepare for the move, which was to be coordinated by Associate Dean Parker.

On June 24, 1984, Dr. Parker met with Plaintiff Corum, Librarian Richard Barker, and staff member Judy Ball to discuss the move. In this meeting, Dr. Parker unexpectedly announced that the collection was to be dismembered with the artifacts of the collection being moved to a storage area in the Belk Library basement.

The Plaintiff, Librarian Barker and Miss Ball saw this change as a dramatic shift from the directions previously given to Dr. Corum by Dr. Durham. Dr. Corum specifically told Dean Parker that this new plan regarding the artifacts was inconsistent with his understanding of Dr. Durham's instructions that the collection would remain intact at University Hall. Dean Parker invited Dr. Corum and his staff to propose alternative solutions to the problems they perceived, but gave no explanation for his drastic departure from Dr. Durham's earlier instructions.

Dr. Corum, Librarian Barker and Miss Ball recognized that the apparently new plan to split the collection and store the artifacts in a basement would jeopardize the collection's integrity and security. After the meeting with Dr. Parker the three library professionals put together an alternative proposal. Since Dr. Durham had chosen to be absent from the campus during the move, Dr. Corum had no opportunity to question the inconsistency between Durham's communications with him and Parker's plans or to tell Durham of the library staff's concerns over the collection's destruction.

At a second meeting with Dean Parker on June 26, 1984, Dr. Corum again stated his concerns over the breakup of the collection and put forward his alternative proposal. Dean Parker responded that he did not have the authority to entertain such a proposal; however, he volunteered to immediately relay Dr. Corum's concern and proposal to Dr. Durham by phone.

At no time did Dr. Corum refuse to go through with the move. In fact, Dr. Corum encouraged the staff to proceed with the move and physically helped in the packing and subsequent move of the collection. After the second meeting, Dr. Parker called Dr. Durham and told Dr. Durham that Dr. Corum had presented an alternative proposal to dismembering the collection, and that Dr. Corum wished to discuss this alternative with Dr. Durham. Dr. Durham immediately returned to Appalachian State University, and without talking to Dr. Corum or giving him any chance to explain his proposal, removed Dr. Corum as Dean of Learning Resources.

At the time of the meetings with Dean Parker, Dr. Corum was unaware that Dr. Durham had intentionally misrepresented to him that the collection was to be moved as a unit. Subsequently it was revealed that, at the time of Dr. Durham's June 21, 1984, meeting with Dr. Corum, another meeting, chaired by Dean Parker, was being held to discuss the actual breakup of the collection. The purpose of this ruse was to deny the academic community time to react to the decision to dismantle the collection. By concealing these plans until the last minute, the collection could be dismembered before the academic community could react. Thus, Dr. Corum's efforts to submit a proposal which would protect the collection met with the swift and chilling decision to remove him as dean. This removal had a single purpose: to signal to lower ranking staff persons within the Learning Resources department that the move was to proceed immediately and without any further questions regarding the destruction of the collection.

Following an unsuccessful internal grievance proceeding, Dr. Corum brought this action. The statement of the legal proceedings set out in the petition reflects the course of the litigation. In addition to ruling on the qualified immunity defense raised by Dr. Durham, the Supreme Court of North Carolina also determined that Dr. Corum's § 1983 claim for prospective equitable relief could proceed against the university officials named in their official capacities and that Dr. Corum had a direct cause of action against Dr. Durham under the state constitution. (Pet. 31A).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is supported by independent and adequate state grounds so that review by the Court would constitute an advisory opinion.

The only issue raised by the petition is whether the North Carolina Supreme Court erred in denying Dr. Durham's qualified immunity defense to Dr. Corum's § 1983 claim for damages. Since the court below determined that Dr. Corum also has a direct cause of action against Dr. Durham under the free expression provisions of the North Carolina Constitution, Dr. Corum may obtain full relief under the judgment of the court below no matter how the federal question raised in the petition is resolved.[1]

As has oft been noted by this Court, the Court's "power is to correct wrong judgments, not to revise opinions. [The Court] is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). In this matter the state supreme court recognized that the state constitution protects the same free expression rights that are safeguarded by the First Amendment; however, the state court did not adopt the qualified

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[1] Counsel for Dr. Durham has acknowledged before the court below that under the provisions of N.C.G.S. § 143-300.2 – 300.6 the state would be responsible for § 1983 damages liability assessed against Dr. Durham up to $100,000. Dr. Corum has agreed and stipulated that he will neither seek nor accept damages in excess of $100,000 from Dr. Durham.

immunity defense that this court has fashioned to protect state officials from claims under § 1983. Rather, it noted that Dr. Durham retained all defenses available under state law. (Pet. 27A). The state court is under no federal obligation to afford state officials a particular type of immunity for violation of state constitutional rights, and the decision by the state court is in no way evasive of, or discriminatory against, federal rights. Thus, this case fits squarely within the rule that where there is an independent and adequate state ground to support the judgment of a state court this court will decline jurisdiction since its review "could not affect the judgment and would therefore be advisory". *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2554 (1991).

2. The court below fully considered and correctly decided the qualified immunity issue.

Writing for the North Carolina Supreme Court, Justice Martin understood the directions of this Court in the *Harlow* and *Anderson* decisions. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). He also recognized, as have a number of the federal circuits, that "*Harlow*'s purely objective test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated." (Pet. 10A) quoting, *Collinson v. Gott*, 895 F.2d 994, 1001-02 (4th Cir. 1990) (Phillips, J., concurring) (citations omitted). Accord, e.g. *Stewart v. Baldwin County Bd. of Election*, 908 F.2d 1499 (11th Cir. 1990); *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990); *Pueblo Neighborhood Health Ctrs., Inc. v.*

Lasavio, 847 F.2d 642 (10th Cir. 1988); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1050 n. 25 (9th Cir. 1988); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1432 (D.C. Cir.) holding vacated, 817 F.2d 144 (D.C. Cir.), holding reinstated sub nom. *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

Justice Martin applied the *Harlow-Anderson* test by first determining if a reasonable official in Dr. Durham's position could have believed that his actions were lawful in light of clearly established law at the time, and in light of the information possessed by Dr. Durham at the time he demoted Dr. Corum. (Pet.12A). To make this determination the court reviewed the federal law at the time of the demotion and determined that the law "clearly protected" a university employee from retaliation based on his statements regarding a matter of public concern. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Meyers*, 461 U.S. 138 (1983). Justice Martin then dealt with the heart of the matter. Dr. Corum alleged that his demotion was based upon his statements while Dr. Durham insisted that Corum's statements were not the bases for his action: "if the motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results." (Pet. 15A). The court then recognized that in a case such as this, where state of mind is an essential element of the right allegedly violated, there is a risk that the impediment to summary resolution which *Harlow* and *Anderson* "deliberately sought to remove could be reimposed." (Pet. 16A). In order to minimize this risk the court below adopted the same test used by at least four of the federal circuits:

> [W]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated.

(Pet. 17A), quoting *Pueblo*, 847 F.2d at 649; see also *Collinson*, 895 F.2d at 1001-02; *Martin*, 812 F.2d at 1434. Accord, e.g., *Stewart*, 908 F.2d 1499.

The court recognized that "[t]his approach appropriately retains the *Harlow* 'objective look' test with respect to the law applicable at the time of the alleged violation, but it also permits a plaintiff who has some proof of the alleged violation to attempt to convince the finder of fact that his allegations are correct." Any approach which foreclosed "this opportunity would effectively prevent every plaintiff from recovering on a claim which has an element requiring a determination of subjective intent." (Pet. 17A).

Justice Martin then reviewed Dr. Corum's evidence and found that the move of the Appalachian Collection had been the subject of public debate on the college campus and that Dr. Corum was a strong proponent of keeping the Collection together if it was moved. Further, not only had Dr. Durham failed to advise Dr. Corum that the Collection was to be split when he informed him of the move, but also Dr. Durham had advised Dr. Corum by memorandum that "the Appalachian Collection will be physically housed in University Hall," specifically leading Dr. Corum to believe that the entire Collection would

be housed together. As Justice Martin then notes: "In fact, Durham had already decided to split the Collection, the artifacts to be stored in the basement of another building. Thus, the 21 June memo becomes the 'smoking gun,' revealing the effort to deceive Dr. Corum until it was too late for public protests." (Pet. 19A-20A).

Having found that Dr. Corum had succeeded in pointing to specific evidence that Dr. Durham's actions were improperly motivated, the court below correctly ruled that the trial judge had properly denied Dr. Durham's motion for summary judgment based upon the defense of qualified immunity. (Pet. 20A). In so doing the court correctly applied the federal law as it relates to the defense of qualified immunity in a case where the state of mind of the defendant is an essential element of the constitutional right allegedly violated.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this the 26th day of October 1992.

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